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# How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession

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# How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession

Stephen Gillers\*

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## I. INTRODUCTION

Discussions of the professional responsibilities of American lawyers tend to ask one of two questions. One question (the macro question) is whether a particular rule strikes the right balance among the multiple interests it purports to reconcile—those of clients, lawyers, adverse parties, courts and other tribunals, and the overall claims of the system of justice based on the rule of law. The second question (the micro question) asks whether in a particular circumstance a lawyer's or law firm's behavior complied with the governing rules. I want briefly to distinguish these two lines of inquiry from yet a third question, my focus here. What is the responsibility of the profession itself when, through its various institutions and especially bar associations, it asks courts or (less often) lawmakers or agencies to adopt particular rules governing the conduct of lawyers? In other words, my subject is the professional responsibility of the legal profession itself, not the conduct of individual lawyers or the correctness of any particular rule. My purpose is to suggest how the work of devising the rules, not the content of a specific rule, might be improved.

The American Bar Association (ABA)—through its staff and the lawyers who volunteer their time—contributes thousands of hours yearly to developing professional conduct rules for lawyers. It is unique in this regard among private organizations, not only in the nation, but, I suspect, also in the world. Overall, its work has been an immense help to courts and lawmakers and thereby has benefitted the rule of law. I have been privileged to serve on two ABA commissions. In 2000–2002, I served on the Multijurisdictional Practice (“MJP”) Commission, which, among other recommendations, proposed rules to recognize temporary cross-border practice in the United States.<sup>1</sup> More recently, beginning in August of 2009 and continuing through February 2013, I have served on the Commission on

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1. These were adopted by the ABA's House of Delegates. The story is told in Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002). The MJP rules on temporary cross-border domestic practice by American lawyers appear in Rule 5.5(c). MODEL CODE OF PROF'L RESPONSIBILITY R. 5.5(c) (2009). That rule has been adopted in the same or substantially similar form in forty-four American jurisdictions as of September 2011. *State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law)*, AM. BAR ASS'N (Sept. 27, 2011), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick\\_guide\\_5\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf).

Ethics 20/20.<sup>2</sup> These have been professionally gratifying experiences and have underscored for me (not that it was necessary) the centrality of the Association's work to the American legal system. While this article identifies some of what I consider to be shortcomings in the way the ABA or its constituents have gone about the Association's business, it does so in order to help make an excellent enterprise even better.

Anyone who spends time among both the legal academics who study and write about the rules governing lawyers and also practicing lawyers who engage with the same subject through bar work or in representing clients quickly notices differences in emphasis and orientation between the two groups. It can sometimes seem that they are not talking about the same thing, that the questions asked by the law teachers are far removed from the practical concerns of the practicing lawyers. Perhaps this is just a further example of what Harry Edwards saw twenty years ago as the "growing disjunction" between academic and practicing lawyers.<sup>3</sup> This Article falls on the practical side of that divide. That is where I feel most comfortable

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2. ABA Commission on Ethics 20/20, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/about\\_us.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html) (last visited Oct. 24, 2012).

3. Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). In a follow up article, Judge Edwards wrote:

In legal education, the principal problem that I see nowadays is the lack of a healthy balance between "impractical" and "practical" teaching and scholarship. By "practical," I mean teaching and scholarship that is both *prescriptive*, in the sense that it instructs lawyers, judges, and other legal decisionmakers on how to resolve legal issues, and also *doctrinal*, in the sense that it gives due weight to the various constraining sources of law, namely precedents, statutes, and constitutions. The paradigm example of "practical scholarship" is the law treatise. In contrast to the "practical" theory employed by the "practical" scholar, the "impractical" scholar's scholarship consists of "abstract" theory divorced from legal doctrine—that is, divorced from the authoritative sources of law that necessarily constrain the arguments available to a legal professional.

Harry Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 WASH. L. REV. 561, 564 (1994). It bears emphasis that Judge Edwards did not wish to ban theory from legal academia. He was looking for the proper balance. At the Fourth Circuit's Judicial Conference in 2011, Chief Justice John Roberts expressed his agreement with the Edwards' view albeit with a dose of parody:

Specifically Roberts claimed that legal scholarship is not relevant to the work of lawyers and judges, saying he is on the same page with Judge Harry T. Edwards of the U.S. Court of Appeals for the D.C. Circuit, who believes there is a great "disconnect between the academy and the profession." Roberts continued, "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."

*Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, AM. CONST. SOC'Y (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99take-on-academic-scholarship> (last visited Oct. 24, 2012).

and believe I have something to add. The explanation no doubt lies in the nine years I spent representing clients before coming to teach, the inordinate amount of time I spend listening to the problems and concerns of lawyers in venues where they tend to gather, and in years of experience on bar groups doing the focused and detailed, even mundane, work of writing and rewriting sentences that will eventually find their way into court rules that lawyers must obey. You can hardly imagine a task more practical than that. In any event, my bar association experience has given me, I hope, a good basis to address, with some specificity, a question rarely raised in academic literature—namely, the rules the legal profession should follow when it drafts rules it will then propose for itself.<sup>4</sup>

## II. A LAWYER'S PROFESSIONAL RESPONSIBILITY DISTINGUISHED

What does it mean to be a lawyer in the United States? Lawyers will likely tell you that their identity (and therefore their professional responsibility) is defined by service to clients. Their job is to work diligently to achieve a client's goals within the bounds of the law and professional conduct rules. No more, no less. (Well, maybe more, because no rule forbids a lawyer, as part of a representation, from discussing extralegal considerations with a client.) Lawyers will cross no forbidden lines, but within the lines they will serve their clients as best they can. Are they willing to work injustice? That may be an uncomfortable question, but it is not a hard one. Lawyers are agents of their clients before the law and their clients' fiduciaries.<sup>5</sup> They are not agents of the justice system or of justice. Their job is to do the job lawfully and ethically. Furthermore, the question assumes lawyers can even know where justice lies in a particular matter. Often they cannot know. Life is messy. Facts shift. The equities

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4. The unquestioned premise of this Article is that the ABA should and will continue to do the labor intensive job of drafting and proposing rules governing the bar, both rules of professional conduct and other rules, like the Model Foreign Legal Consultant Rule, MODEL RULE FOR THE LICENSING AND PRACTICE OF FOREIGN LEGAL CONSULTANTS (2006), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/FLC.authcheckdam.pdf>, the Model Rule on Pro Hac Vice Admission, MODEL RULE ON PRO HAC VICE ADMISSION (2002), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/model\\_rule\\_pro\\_hac\\_vice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/model_rule_pro_hac_vice.authcheckdam.pdf), and the Model Rule on Admission by Motion, MODEL RULE ON ADMISSION BY MOTION (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model\\_rule\\_admission\\_motion.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_admission_motion.authcheckdam.pdf), to name a few. The Association's work has been questioned, most prominently in Richard Abel's much-cited article whose provocative title reveals his skepticism. Richard Abel, *Why Does the ABA Promulgate Ethics Rules?*, 59 TEX. L. REV. 639 (1981). Questions that start with "Why should it?" and "Why does it?" are, of course, legitimate. But the Association has decided that it should and so it does. For someone like me, whose work is almost entirely wrapped up in the world of the practicing bar and the rules that do and should govern its members, that's enough of a reason to sign on.

5. *Matter of Cooperman*, 633 N.E.2d 1069 (N.Y. App. 1994); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16, cmt. b (2000) ("A lawyer is a fiduciary . . .").

change. What was clear yesterday may become cloudy tomorrow. But even when lawyers do know where justice lies, justice is not part of their job description.<sup>6</sup> The public may have a hard time understanding that, but for the bar it's a truism. Defensively, lawyers may protest that they are not insensitive to fairness and justice. When not acting for clients, they may insist that they are as devoted to justice as any other man or woman, maybe more than most given their training. And they are willing to discuss fairness and justice with a client when the situation invites it. But, in the end, it is a client's decision whether to subordinate her legal rights and goals to other values, which may differ from the lawyer's values.

Despite what lawyers know as a truism, popular culture and law professors freely exploit the differences between what the public and law students (at least first-year students) might say justice requires or forbids and what a governing rule may forbid or require. Examples of such conduct might include defending a person the lawyer knows to be guilty of a crime (usually a horrific one); cross-examining an adverse witness with the goal of exposing him as a liar when the lawyer knows he is telling the truth; asserting a statute of limitations or technical defense to a needy plaintiff's rightful claims, on behalf of a wealthy defendant; asking a jury to draw an inference from true evidence properly admitted when the lawyer knows that the inference is false; exploiting as far as the rules permit the factual and legal ignorance of the inexperienced opposing lawyer; or through a narrow reading of discovery demands finding a defensible way to deny an adverse party documentary evidence that would advance or even clinch her claim.

While questions about the rightness of such behavior may be appealing to pose in law school classes, and for books, films, and television to use to cast doubt on the "morality" of the bar, individual lawyers who engage in it cannot fairly be criticized. The tactics, ordinarily required if they benefit the client, are all part of the adversary system, the legal equivalent of laissez faire economics, and that's enough of an answer for lawyers. How can a person be criticized for doing what the law and rules demand (or for not doing what they forbid), laws and rules that she has taken an oath to honor? She can't. Yes, perhaps she can be criticized for accepting a matter in the first place if she will then be obligated to act unjustly though lawfully, assuming she can know it at the outset. However, criticism for choosing to accept the representation of clients whom the critic deems unworthy is not based on the lawyer's behavior as a lawyer for a client but on her choices as

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6. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16 (2000) (detailing a lawyer's duties to a client, essentially constituting a lawyer's job description, but making no mention—either in the main text or in the comments that follow—of a duty to obtain justice).

a person.<sup>7</sup> Once the matter is accepted, the lawyer's duty is to expeditiously pursue the client's goals within the bounds of the law and rules of professional conduct unless there are valid reasons to withdraw.<sup>8</sup>

Sometimes, however, a lawyer does have discretion. I do not mean discretion about how to handle a matter—strategic discretion—which lawyers must have as professionals. I mean discretion to do what is right, as they see it, because the lawyer's conduct is not dictated by ethics rules or legal obligations. Even if a lawyer is never in one of these discretionary situations, how she would choose if she were serves to construct her professional identity. For example, the exceptions to confidentiality are permissive, not mandatory,<sup>9</sup> except when necessary to remedy perjury or other fraud on a tribunal.<sup>10</sup> These are the most obvious discretionary rules. Do (or would) lawyers use that discretion, how often, and when? Other discretionary rules include the freedom of a lawyer in advising a client to “refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation;”<sup>11</sup> the authority to withdraw from a matter—or seek permission to withdraw—when, among other reasons, “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;”<sup>12</sup> and the rules' encouragement (not a requirement) that lawyers do some work without fee (*pro bono publico*).<sup>13</sup>

Freedom to choose carries responsibility for how we choose. So the public and other lawyers can properly criticize how a lawyer chooses when choice is allowed. In theory, at least, how lawyers exercise the several opportunities for discretion could yield rich information. We could begin to discern American lawyers' conception of their professional identity—beyond the duty to represent clients within the bounds of law and ethics rules—if somehow, momentarily omniscient, we could know all of the discretionary choices made by all American lawyers in the span of, say, a year. Perhaps social scientists will someday devise a series of hypothetical questions the answers to which will yield a statistically reliable substitute for omniscience and tell us more than we can now know about the professional identity of the American bar. But for the moment, at least, that information is beyond us.

Distinct from both the professional responsibility of individual lawyers

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7. This statement requires a qualification. The lawyer may contend that although she had no duty to accept the matter, doing so fulfills the promise of the legal system that persons in need of counsel will be able to get a lawyer, at least if they can afford it.

8. MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 1 (2009).

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009).

10. *Id.* R. 3.3(b)–(c).

11. *Id.* R. 2.1.

12. *Id.* R. 1.16(b)(4).

13. *Id.* R. 6.1.

and inquiry into the language of professional conduct rules is a third question. What is the responsibility of the bar when it proposes such rules for courts or lawmakers to adopt? To that question I now turn.

Part III identifies the postulates that should guide us in defining the legal profession's public responsibility.<sup>14</sup> Part IV addresses responsibility for predictive uncertainty when the profession anticipates the consequences of a proposed rule.<sup>15</sup> In Part V, I offer early examples of the bar's failure to subordinate the business interests of lawyers to the competing interests of clients, the justice system, or both.<sup>16</sup> I provide these as a prelude to the debates in Part VI, whose subject is recent examples of a failure of professional responsibility.<sup>17</sup> Part VII cites screening lateral lawyers as an example of one situation where the presumption in favor of the client's interest ahead of the interests of lawyers was properly rebutted.<sup>18</sup> Part VIII offers some ideas about how the bar can do a better job.<sup>19</sup> Part IX recommends a new committee whose role will be to anticipate the future and thereby to enable the bar to be ready rather than reactive.<sup>20</sup> I propose initial agenda items for that committee.<sup>21</sup>

### III. THE LEGAL PROFESSION'S PROFESSIONAL RESPONSIBILITY: THE BASIC POSTULATES

What conventions or processes ought to govern how bar associations in general, and the American Bar Association in particular, fashion the rules they will propose to courts and lawmakers? Two facts are essential to understanding the professional responsibility of the legal profession. First, the profession as such does not have a client, nor does a bar association.<sup>22</sup> So we need not concern ourselves with the specific ethics rules governing the lawyer-client relationship or with agency or other law that presumes the existence of a client as a lawyer's principal. Second, bar associations assist

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14. See discussion *infra* Part III.

15. See discussion *infra* Part IV.

16. See discussion *infra* Part V.

17. See discussion *infra* Part VI.

18. See discussion *infra* Part VII.

19. See discussion *infra* Part VIII.

20. See discussion *infra* Part IX.

21. See discussion *infra* Part IX.

22. The mission statement of the ABA states that the only four goals of the organization are to "serve our members; improve our profession; eliminate bias and enhance diversity; advance the rule of law." *Association Overview and Structure*, AM. BAR ASS'N, at 1, available at [http://www.americanbar.org/content/dam/aba/administrative/2011\\_2012\\_greenbook\\_ch\\_12.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/2011_2012_greenbook_ch_12.authcheckdam.pdf).



in the development and adoption of the rules that an individual lawyer must obey.<sup>23</sup> Nowhere do bar associations actually have power to prescribe professional conduct rules—courts, and, to a lesser extent, lawmakers, do that.<sup>24</sup> But the profession does influence the courts, which explains the striking similarity between the ABA’s Model Rules of Professional Conduct and the ethics rules that courts in U.S. jurisdictions nationwide have adopted.<sup>25</sup> Courts deviate from the Model Rules but not by much.<sup>26</sup> We must ask what should guide the profession when it exercises this great influence.

The legal profession is hard to pin down. It is big and shapeless.<sup>27</sup> It has shifting factions that can change membership depending on the issue. The bar is rarely unanimous and often divided.<sup>28</sup> What it proposes or opposes is the distillation of an aggregation of views and therefore compromise.<sup>29</sup> The bar may support rules that many lawyers oppose, but they will have lost the debate and the vote. Committees of a bar association

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23. For example, a commission of the California State Bar has spent more than a decade revising that state’s ethical rules, which will ultimately be presented to the state supreme court. *See Commission for the Revision of the Rules of Professional Conduct*, THE STATE BAR OF CAL., <http://ethics.calbar.ca.gov/committees/rulescommission.aspx> (last visited Oct. 24, 2012). The New York State Bar Association similarly reviewed that state’s ethics rules and proposed revisions to the courts. *See Proposed Rules of Professional Conduct*, N.Y. STATE BAR ASS’N (Feb. 1, 2008), available at [http://www.nysba.org/AM/Template.cfm?Section=Proposed\\_New\\_York\\_Rules\\_of\\_Professional\\_Conduct\\_Approved\\_Nov\\_3\\_2007&Template=/CM/ContentDisplay.cfm&ContentID=15179](http://www.nysba.org/AM/Template.cfm?Section=Proposed_New_York_Rules_of_Professional_Conduct_Approved_Nov_3_2007&Template=/CM/ContentDisplay.cfm&ContentID=15179); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 1, cmt. d (2000).

24. Courts often insist that either explicitly or implicitly, the judicial power includes the power to regulate the bar and are more or less tolerant of legislation that purports to do the same. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 1, cmt. c (2000).

25. The ABA has compiled charts showing variations in the text of particular rules. *See generally Charts Comparing Individual Professional Conduct Model Rules as Adopted or Proposed by States to ABA Model Rules*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts.html](http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html) (last visited Oct. 24, 2012). While there are certainly differences, the similarities, including the organization of the rules, are extensive. *Id.* I realize lawyers are regulated in many ways other than through professional conduct rules. *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). And some have questioned whether judges should have the power to write the professional conduct rules. *See, e.g.,* Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149 (2010). But my starting point here is that judges *do* decide what the rules will be and that lawyers, especially through bar associations, have significant influence in those judicial decisions.

26. *See* STEPHEN GILLERS, ROY SIMON & ANDREW PERLMAN, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* (2012) (annotating variations among American jurisdictions).

27. According to the ABA, in 2011 there were 1,245,205 licensed American lawyers. *Lawyer Demographics*, AM. BAR ASS’N (2012), available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf).

28. Perhaps the greatest state deviations appear in exceptions to confidentiality. *See* GILLERS ET AL., *supra* note 26, at 82–89.

29. *See generally* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441–45 (2002) (detailing the five-year process undertaken by the ABA Commission tasked with revising the Rules of Professional Conduct in 2000 and stating that the Commission “engaged in regular communication with its 250-member advisory council” and “received and considered literally hundreds of comments on its work”).

charged to recommend rules to their organization must take into consideration which rules have a realistic chance of adoption. They may not be what a majority of a committee's members would support if the choice were theirs alone. The art of making change in ethics rules is, like politics, an art of the possible.<sup>30</sup> To speak of the responsibility of the bar, then, is a bit like speaking about the responsibility of "the community" or even humankind. But unlike those esoteric discussions, which have gone on for centuries and which do not demand or invite finality, rulemaking requires closure, at least until a new rule emerges. At the end of any process to revise a rule—and it is very much a process, sometimes lengthy, as I have learned in my own bar work—a recommendation is made and the bar must then accept responsibility for it and for the process that produced it. It is fair, then, to look to the bar's public positions and methodologies as a measure of its fulfillment of its public responsibility.

The profession serves three constituencies when it asks courts to approve professional conduct rules (and from here on I will focus mostly on courts because legislation plays a lesser, though not irrelevant, role in my discussion). First, clients as a group are a constituency, not a lawyer's individual clients. Lawyers who participate in rulemaking for the profession should disclose when a decision may "materially benefit[]" a particular client.<sup>31</sup> The lawyer's duty is to protect the "integrity" of the rulemaking,<sup>32</sup> where the objective is to identify the ethical duties all lawyers owe all clients—or all clients in a particular category—in a system governed by the rule of law. Second, lawyers are themselves a constituency because lawyers are the agent-intermediaries between clients and the rule of law and for that reason the bar has a collective or institutional interest in the rules that govern the bar. The content of those rules will affect how lawyers do their job. However, the status of lawyers as a constituency requires a distinction. They are a constituency only because of their agency status. The career and economic interests of lawyers, individually or collectively, are not by themselves deserving of concern with an exception discussed below.<sup>33</sup> But as the history I recount in Part V warns us, the bar has on occasion favored its economic interests ahead of other interests.<sup>34</sup> The third constituency is

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30. I saw that in the work of the ABA's Multijurisdictional Practice Commission and again in my membership on the ABA's Commission on Ethics 20/20. See Gillers, *supra* note 1.

31. MODEL RULES OF PROF'L CONDUCT R. 6.4 (2009).

32. *Id.* R. 6.4 cmt. 1.

33. See *infra* Part VII.

34. See *infra* Part V.

the justice system itself.<sup>35</sup> The justice system broadly defined—or we could say a society based on the rule of law—is in the picture in the form of its institutions, particularly courts and other tribunals. The goals of the justice system are difficult to catalogue, of course, as will be the means best able to achieve them. The point is that for every proposed rule we must be cognizant of the consequences to the goals embedded in the rule of law. At the very least, one goal is to facilitate access to legal advice and therefore to the rule of law.<sup>36</sup>

The interests of the three constituencies may clash, but when they do, the following postulates should ordinarily determine the outcome. First, the profession's professional responsibility should require it to subordinate its own interests and those of clients to those of the justice system, even when the first two are aligned. This is not majority rule. The justice system and rule of law should prevail against the other two. Of course, the overhanging and difficult question will be to identify the interests of the justice system in any particular circumstance. But unless the combined interests of clients or lawyers is *justice by definition*, which I do not believe it is, the interests of justice have to be identified and must prevail. Second, as between the interests of lawyers and those of clients, the latter should *presumptively* control, but the presumption should be rebuttable because, in some circumstances, the threat to clients is minimal and the advantages to lawyers (and indirectly to the rule of law) is substantial.<sup>37</sup> The inquiry requires disinterested consideration.

#### IV. THE LEGAL PROFESSION'S PROFESSIONAL RESPONSIBILITY: THE PROBLEM OF PREDICTIVE UNCERTAINTY

Consider the rule defining a lawyer's duty on discovering a client's fraud on a tribunal in a matter in which the lawyer is representing the client.<sup>38</sup> Perhaps the unaware lawyer has submitted a document she then learns is fraudulent or learns that the client lied at a deposition or in trial testimony. The client's interest is obvious: don't tell. As he sees it, the lawyer's confidentiality duty should be higher than any duty to the tribunal or the adversary. The lawyer's preference may be the same. The lawyer, though angry at the client, may not relish giving the judge information that can support an investigation and possible indictment of the client for perjury or obstruction of justice. Also, lawyers may argue that the greater the number of exceptions to confidentiality, the greater the likelihood that clients will conceal information the lawyer needs to represent the client

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35. See Abel, *supra* note 4, at 672.

36. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 6 (2009).

37. See *infra* Part VII.

38. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009).

competently.<sup>39</sup> On the other hand, the interests of the justice system may require disclosure if that is the only way to avoid a verdict based on fraud. Today, that is in fact the ABA rule,<sup>40</sup> although not the rule everywhere,<sup>41</sup> and it has not always been the ABA rule.<sup>42</sup>

We can imagine the same sort of clash when the work is not before a tribunal but in the negotiation of a transaction. However, the ABA rules do not then require (but may permit) disclosure, although they may also require the lawyer to withdraw.<sup>43</sup> This resolution favors the client who would not wish to have his fraud revealed. And it favors the lawyer who may prefer not to disclose the fraud. But do these results honor the goals of the justice system and the rule of law? If the client is able to consummate the fraud following the lawyer's mandated withdrawal,<sup>44</sup> the opponent in the transaction is a victim of injustice.<sup>45</sup> So, too, indirectly, may be others. That is not good for the rule of law, which should make it hard to defraud people. On the other hand, perhaps requiring the lawyer to disclose the fraud is even worse for the rule of law because it will discourage client candor, leaving an uninformed lawyer unable to persuade the client to desist. If she succeeds in doing so, no injustice occurs.

We can debate which resolution is best for the rule of law, but that's not my purpose. Rather, I ask whether the profession is able to prefer, and has in fact preferred, the interests of lawyers and clients over the interests of the justice system when it tries to identify the best resolutions of the issues. In other words, has the profession equated the public interest with the narrower interests of clients and lawyers?

Debates over the proper rule when a lawyer confronts fraud on a court or fraud in a negotiation often entail conflicting empirical predictions. The

39. See Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions* . . . , 81 NEB. L. REV. 1320, 1324 (2003).

40. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009).

41. See, e.g., MASS. RULES OF PROF'L CONDUCT R. 3.3 (2011); D.C. RULES OF PROF'L CONDUCT R. 3.3 (2007).

42. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 341 (1975) (construing the DR 7-102(B)(1)).

43. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009). Rule 4.1 protects the client's confidential information if disclosure is "prohibited by Rule 1.6." *Id.* But several of the exceptions to confidentiality in Rule 1.6(b), particularly Rule 1.6(b)(2) and (b)(3), will permit disclosure of many client frauds, thereby freeing the lawyer to disclose confidences to prevent frauds or prevent or mitigate the harm from frauds in which the lawyer's services have been employed. *Id.* R. 1.6(b). When the permissive confidentiality exceptions in Rule 1.6 are superimposed on the mandatory language in Rule 4.1, the result may be to require the lawyer to disclose confidential information to avoid assisting in a crime or fraud or to withdraw.

44. *Id.* R. 1.2(d), 1.16(a)(1).

45. See Martyn, *supra* note 39, at 1339.

argument against forced disclosure to prevent transactional fraud or fraud on a tribunal has the same objective as the contrary argument, namely to prevent the fraud or limit its harm. The goals are the same. The argument against mandatory disclosure (or even in favor of mandatory non-disclosure) predicts, however, that this goal will more often be successful if the lawyer is not obligated to disclose (or is obligated not to disclose). That prediction is based on a view of human behavior. It makes certain assumptions that it does not test. But a contrary behavioral assumption is also possible, namely that fraudsters are not going to confide their fraud to their lawyers regardless of what the confidentiality rule's exceptions may forbid, require, or allow, so lawyers will not have a chance to persuade them to stop. And when lawyers do learn of client fraud, they often do so not from the client but from their own investigations. Or, if from their client, it is because the client has slipped up. If this contrary empirical assumption is more often than not correct, then the argument against a mandatory disclosure rule (or in favor of a mandatory non-disclosure rule) based on a prediction about client behavior is weakened, perhaps fatally. But how do we know?

A lawyer's prediction of harmful consequences if a court rules one way or another may be effective when lawyers act as advocates. It is certainly common. But when lawyers exercise their quasi-public powers in urging courts to adopt one version of a rule rather than another, they are not acting as advocates. We should then view the courts as akin to clients. Lawyers have a duty to provide clients with accurate information so they can intelligently answer the questions that are within their authority.<sup>46</sup> That duty includes identifying and evaluating predictive uncertainty when it exists, as it often will.<sup>47</sup> The bar should have this duty to the courts, too. In meeting that public responsibility, lawyers are, in the purest sense, officers or friends of the court. For the two examples in this Part—fraud on a tribunal and fraud on a person—the predictive uncertainty may appear insoluble. I suppose it is if we mean to say that we cannot know the answers with certainty. But there may be a way to increase confidence. American jurisdictions have strikingly different exceptions to their confidentiality rules. On a spectrum, California's rules are the most protective of confidentiality, with only one explicit (and permissive) exception.<sup>48</sup> New Jersey, by contrast, has many exceptions, some of them mandatory.<sup>49</sup> So one would suppose that an inquiry into the experience of lawyers in these states, and others along the spectrum from least to most protective of client

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46. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009).

47. See *Wood v. McGrath, North, Mullin, & Kratz, P.C.*, 589 N.W.2d 103, 106 (Neb. 1999) (discussing the duty to inform client in assessing a settlement offer when "issue is uncertain, unsettled or debatable").

48. CAL. RULES OF PROF'L CONDUCT R. 3-100 (2012) (stating that the lawyer may disclose criminal act "likely to result in death or substantial bodily harm").

49. N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (1984).

confidences, could produce useful information to test our predictions. The answers can be used along with other information in helping to identify the rule that best serves the system of justice and the goal of preventing fraud. So far as I know, no one has attempted this investigation, but that has not stopped the predictions. I will argue that when the profession makes arguments based on prediction, it should be candid about the basis for the prediction, and, where possible, have evidence supporting the prediction or else acknowledge that it does not have this evidence and justify its absence.<sup>50</sup>

#### V. EARLY EXAMPLES WHERE THE BAR'S INTERESTS PREVAILED OVER THOSE OF THE JUSTICE SYSTEM OR CLIENTS

Money, as might be expected, can lead lawyers astray much as it can anyone else. Rules and court rulings that threaten to increase competition or reduce lawyers' incomes are a prime target of the bar's opposition as shown in the examples below.<sup>51</sup> Of course, financial reward is rarely, if ever, cited as the reason to oppose a rule. A proxy must be found, based in the interests of clients or the true ends of justice. But the profit motive may not be far from the surface or even at it. Three early examples of this behavior are the fierce resistance to efforts of union members to use group purchasing power to lower legal fees;<sup>52</sup> support of minimum fee schedules;<sup>53</sup> and the persistent opposition to lawyer advertising even after the Supreme Court brought it within the protection of the First Amendment's commercial speech doctrine.<sup>54</sup> In a fourth example, the issue was a lawyer's duty to an organizational client.<sup>55</sup> Money was not directly implicated there, but job security and business expectations were.

##### A. The Union Cases

Although, as these things are measured, the three union cases are today ancient history, still, we should never forget them.<sup>56</sup> They reveal how easy it was to disguise opposition to an innovation by citing protection of clients,

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50. See *infra* Part VIII.B.

51. See *infra* Parts V.A–D.

52. See *infra* Part V.A.

53. See *infra* Part V.B.

54. See *infra* Part V.C.

55. See *infra* Part V.D.

56. The cases are: *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964).

when, in fact, the union efforts in these cases promised substantial benefits for clients at the expense of the private bar, and the need for protection was conjectural. A better reason to remember the union cases, I suggest, is because the impulse they displayed has not gone away and never will. The bar is and always will be capable of behaving the same way. Nothing surprising there. After all, the bar is composed of lawyers, and lawyers, like people everywhere, are not without self-interest—although, again like people everywhere, they may protest that their motives are altruistic. Nor is such a claim necessarily an act of conscious deception, a purposeful strategy of using public interest or client interest to mask selfish motives. I assume that most often it is not. People can persuade themselves easily enough that their goals are selfless.<sup>57</sup>

Unions attempted to use the group purchasing power of their members to lower legal fees and otherwise protect workers injured on the job. They did this either by negotiating lower fees with designated lawyers,<sup>58</sup> to whom members would then be referred, or by putting a salaried lawyer on staff to represent union members,<sup>59</sup> much like companies that reduce legal fees to outside law firms by hiring lawyers to work as employees. No injured worker was required to use the designated or staff lawyers.<sup>60</sup> But of course it could be much cheaper (or free) to do so, and each time one did other lawyers lost a client. So the stakes were high and threatened to be higher if the idea spread. The three union cases reached the Supreme Court between 1964 and 1971.<sup>61</sup> The American Bar Association filed an amicus brief in the first of the cases, urging the Court to uphold the challenge to the union's plan.<sup>62</sup> It argued that the plan, by which the union negotiated reduced fees with designated lawyers, amounted to the unauthorized practice of law and that the lawyers who participated in it were acting unethically.<sup>63</sup> After the first of the cases was decided in favor of the union, the ABA persisted. Joined by forty-eight state and local bar associations, it asked the Court to rehear the case.<sup>64</sup> Justice Black wrote all three opinions rejecting the challenges. His language in the last of the cases displays his incredulity at

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57. See W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 570 (2001) (“[I]t is not hard to convince oneself that one’s primary motivation is not to make money and so to imagine that one is acting professionally . . .”).

58. See *United Transp. Union*, 401 U.S. at 577–78, 584. In the first of the cases, *Bhd. of R.R. Trainmen*, 377 U.S. at 2, the union’s referrals to particular lawyers reflected a desire to ensure competent representation.

59. See *United Mine Workers*, 389 U.S. at 218–21.

60. See, e.g., *United Transp. Union*, 401 U.S. at 477 (explaining that the union “recommended” lawyers to its members); *Bhd. of R.R. Trainmen*, 377 U.S. at 8 (same).

61. See *supra* note 56.

62. Brief for American Bar Association as Amicus Curiae Supporting Respondents, *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1 (1964) (No. 34), 1963 WL 105695.

63. *Id.* at 6–8.

64. *Id.*

and exasperation with these efforts. Here are the strongly worded first and last paragraphs of that opinion, which seem to have put an end to such challenges:

The Michigan State Bar brought this action in January 1959 to enjoin the members of the Brotherhood of Railroad Trainmen from engaging in activities undertaken for the stated purpose of assisting their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act. The complaint charged, as factors relevant to the cause of action, that the Union recommended selected attorneys to its members and their families, that it secured a commitment from those attorneys that the maximum fee charged would not exceed 25% of the recovery, and that it recommended Chicago lawyers to represent Michigan claimants. *The State Bar's complaint appears to be a plea for court protection of unlimited legal fees . . .*<sup>65</sup>

In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. *The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.* However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in *United Mine Workers, Trainmen, and NAACP v. Button*. The injunction in the present case cannot stand in the face of these prior decisions.<sup>66</sup>

The challengers in the union cases did not, of course, argue for "court protection of unlimited legal fees." As framed in Justice Harlan's dissent in *United Mine Workers*, the challengers argued that if the union could appear

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65. 401 U.S. at 577–78 (emphasis added).

66. *Id.* at 585–86 (emphasis added).



as an intermediary between the worker and lawyers, apparently in any capacity, the state could anticipate that the lawyers might then disserve a worker when it benefitted the union to do so.<sup>67</sup> In fact, the word “might” appears several times in Justice Harlan’s dissent in *United Mine Workers*.<sup>68</sup> Of course, disloyalty is always a risk when lawyers feel allegiance to other interests, including their own.<sup>69</sup> This is the danger that the conflict rules aim to reduce,<sup>70</sup> but it can never be entirely eliminated. In other situations, when advantageous to the income of the bar, we tolerate risk or we permit clients to consent to the presence of risk, although a client’s consent to risk does not authorize her lawyer to succumb to it.<sup>71</sup>

### B. Minimum Fee Schedules

To get a mortgage when they bought a Virginia home, the Goldfarbs needed a lawyer to perform a title search.<sup>72</sup> The first lawyer they talked to

told them that it was his policy to keep his charges in line with the [State Bar’s] minimum-fee schedule which provided for a fee of 1% of the value of the property involved [for the work the Goldfarbs needed]. Petitioners then tried to find a lawyer who would examine the title for less than the fee fixed by the schedule. They sent letters to 36 other Fairfax County lawyers requesting their fees. Nineteen replied, and none indicated that he would charge less than the rate fixed by the schedule; several stated that they knew of no attorney who would do so.<sup>73</sup>

A lawyer could be disciplined for ignoring the minimum fee schedule.<sup>74</sup> A unanimous Supreme Court held that the schedule violated the Sherman Antitrust Act.<sup>75</sup> It rejected the bar’s claim that a “learned profession” was not subject to the Act’s prohibition on anticompetitive conduct because it was not in “trade or commerce” within the meaning of the Act.<sup>76</sup> “In

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67. 389 U.S. at 230–32 (Harlan, J. dissenting).

68. *Id.* at 228–32 (Harlan, J., dissenting).

69. See Stephen Gillers, *What We Talked About When We Talked about Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 251 (1985) (discussing what constitutes disloyalty on the part of a lawyer).

70. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.7 (2009) (general rule on concurrent conflicts of interest).

71. See, e.g., *id.* R. 1.8(f) (containing restrictions to ensure that a person paying a lawyer’s fee to represent another person will not subvert the lawyer’s duty to the client).

72. *Goldfarb v. Va. ex rel. Va. State Bar*, 421 U.S. 773, 776 (1975).

73. *Id.* at 776.

74. *Id.* at 781 (“The fee schedule was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norm . . .”).

75. *Id.* at 793.

76. *Id.* at 786.

arguing that learned professions are not ‘trade or commerce,’” the Court wrote that “the County Bar seeks a total exclusion from antitrust regulation. Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended any such sweeping exclusion.”<sup>77</sup> And in a footnote, the Court recognized what would have been clear to many, namely that “[t]he reason for adopting the fee schedule does not appear to have been wholly altruistic. The first sentence in respondent State Bar’s 1962 Minimum Fee Schedule Report states: ‘The lawyers have slowly, but surely, been committing economic suicide as a profession.’”<sup>78</sup>

The ABA, the National Organization of Bar Counsel, the State Bar of Texas, the State Bar of Wisconsin, and the Bar Association of San Francisco, among others, filed amicus briefs supporting the Virginia Bar, at least in part.<sup>79</sup> The ABA brief equivocated. It said that the Association did not support schedules that “fix fees,” but had supported fee schedules “in certain contexts.”<sup>80</sup> There were apparently good fee schedules and bad ones. The brief proposed a test that courts could use to distinguish between the two.<sup>81</sup> It did not apply its test to the Virginia schedule and so took no explicit position on how the Court should rule.<sup>82</sup>

Why didn’t the ABA and other bar groups support the Goldfarbs? Aside from enhancing the income of lawyers—a goal no one endorsed as legitimate—what is the value of minimum fee schedules, which the ABA was prepared to accept as appropriate in some (ill-defined) circumstances although not categorically? The closest to a seemingly neutral defense of minimum fee schedules might go this way: without minimum fee schedules, lawyers will compete on price and consumers will choose the cheapest lawyer, which is not an advisable way to choose a lawyer. Clients had to be protected from themselves. Further, as fees declined in the wake of price competition, lawyers would have to take on more clients to earn a living. Time, which is what lawyers sell, is finite. The result would be less time for each matter and a heightened risk of poor work. A minimum fee schedule encourages competent representation. It cannot do that by itself, of course.

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77. *Id.* at 787.

78. *Id.* at 786 n.16.

79. *See* Brief for American Bar Association as Amicus Curiae Supporting Respondents, *Goldfarb v. Va. ex rel. Va. State Bar*, 421 U.S. 773 (1975).

80. *Id.* at 18.

81. “In assessing their [fee schedules] legality, the Court should determine whether the justifications for the particular schedules at issue constitute legitimate objectives of professional regulation.” *Id.*

82. *Id.*

Nor will every low cost lawyer be incompetent. It is a matter of probabilities. The probability of competent work increases if lawyers are adequately compensated and can spend as much time on a matter as it demands.

Or, to put this argument bluntly and less neutrally, a lawyer's duty of competent representation is insufficient by itself to ensure competent representation. Lawyers have to be paid a minimum amount to encourage them to do competent work. Left to the market, lawyers will follow the cash even if it means they will not be able to do a good job. Not that any lawyer would choose such an outcome, but that is what will happen often enough, despite their best intentions. As a result, clients will be hurt. In short, the profession needs minimum fee schedules not to enrich lawyers but to protect clients. This defense would likely be seen as a slur on the profession's character if uttered from outside the bar. Yet, implicitly at least, this is the claim lawyers themselves were making.

In addition to the money angle in the union cases and in *Goldfarb*, another fact must be underscored. Changes to the way lawyers could do business that would reduce legal costs were not the product of a suddenly enlightened profession that set aside its self-interest. The courts forced the changes and the bar had to comply. Change came from outside. *Goldfarb's* holding was categorical—it ended all minimum fee schedules imposed by bar associations. But the union cases could be contained, and that was the bar's response: seek to limit the reach of the rulings. The ABA did not try to find new ways to organize the market for legal services—that is, to adopt rules that would afford potential clients who were not members of unions the ability to use combined purchasing power to keep fees low. Rather, it made any such effort burdensome. In 1969, after the second of the three union cases, the ABA amended DR 2-103(D) of the Model Code of Professional Responsibility to allow lawyers to work with lay intermediaries “only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services *requires* the allowance of such legal service activities.”<sup>83</sup> This restriction was eased somewhat in 1975.<sup>84</sup>

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83. Thomas Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 589 (emphasis added) (citing 94 REPS. OF THE A.B.A. 390 (1969)).

84. *Id.* at 590. As amended, DR 2-103(D)(4) contained other restrictions on a lawyer's ability to accept matters from an “organization that recommends, furnishes or pays for legal services to its members or beneficiaries,” including a requirement that the organization pay for counsel outside its plan and a detailed filing requirement:

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances

*C. Lawyer Advertising*

Two years after *Goldfarb*, *Bates v. Arizona State Bar*<sup>85</sup> addressed the broad national prohibition on lawyer advertising. The ABA as amicus argued that the First Amendment did not even protect the bare bones advertisement before the Court.<sup>86</sup> The brief said:

The prevention of misleading, confusing or non-informative announcements is not, however, the only concern of the States. Certain forms of information dissemination concerning legal services may affect the quality and nature of those services, may compromise the independence of an attorney, may draw into question the integrity of the judicial process, may encourage the bringing of litigation for improper motives, and may have other adverse consequences for the judicial system.<sup>87</sup>

But the Association (and local bar groups<sup>88</sup>) landed on the wrong side of history once more. The Court granted commercial speech protection to lawyer advertising.<sup>89</sup> Yet again, change was forced upon the bar from outside. Lawyer advertising also threatens lawyers' income, but not the income of all lawyers. Lawyers with established practices, who depended on and had reason to expect repeat business and referrals from other lawyers and former clients, were more likely to view legal advertising as a particular threat because they did not need it.<sup>90</sup> But other, perhaps less established, lawyers could now make their availability known to current and potential

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of the matter involved and the plan provides an appropriate procedure for seeking such relief . . . .

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

MODEL CODE OF PROF'L RESPONSIBILITY DR 2-103(D)(4) (1985).

85. 433 U.S. 350 (1977).

86. The stripped down (I'm tempted to say "pathetic") legal advertisement that spawned the revolution in lawyer advertising is in an appendix to the opinion. *Id.* at 385.

87. Amicus Brief of the American Bar Association Supporting Appellee, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (No.76-316), 1976 WL 178671, at \*2.

88. The Westlaw report of the case shows amicus briefs supporting Arizona from bar associations in, among other jurisdictions: Iowa, New York, North Carolina, Maryland, Texas, and Virginia.

89. *Bates*, 433 U.S. at 384.

90. See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 335 (1996).

clients directly.<sup>91</sup> So could lawyers whose business model relied on volume and for whom volume permitted lower fees.<sup>92</sup> As lawyers became more sophisticated in the efficient and effective use of marketing, such threats would predictably grow. In addition, *Bates*, coming after *Goldfarb*, meant that lawyers could advertise their competitive fees for routine services as well as their hourly rates.<sup>93</sup> Indeed, the content of the advertisement in *Bates* was merely a list of routine services and prices.<sup>94</sup>

The potential breadth of *Bates*'s protection was destined to be the subject of intra-professional squabbles in one of two ways. First, courts adopted rules meant to put as much of the advertising genie back in the bottle as the Supreme Court might permit.<sup>95</sup> Lawyers wishing to advertise opposed these efforts, citing their commercial speech rights.<sup>96</sup> Second, disciplinary bodies that targeted lawyers for improper advertisements faced First Amendment defenses.<sup>97</sup> The outcomes of these cases were decidedly one-sided. The lawyers who relied on *Bates* to challenge restrictive rules won every Supreme Court contest in the ensuing eighteen years,<sup>98</sup> except for two narrow decisions of limited scope.<sup>99</sup>

#### D. Lawyers for Organizations

Although the subject of Rule 1.13 is lawyers working for organizations,<sup>100</sup> corporations are much the dominant organization. When a lawyer represents a company, she necessarily takes her instructions from its

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91. *Id.*

92. *Id.*

93. *Bates*, 433 U.S. at 367–68, 384–85.

94. These included uncontested divorce, individual bankruptcy, name change, and adoption. *Id.* at 385.

95. That effort has continued three decades later. *See, e.g.*, *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (finding many of the provisions of New York's rules on law advertising unconstitutional).

96. *See, e.g.*, *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding that the State could not categorically prohibit lawyers from soliciting legal business by truthful and nondeceptive mail sent to persons known to need legal representation); *Alexander*, 598 F.3d 79.

97. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985) (invalidating state rule that restricted the content of newspaper advertisements aimed at persons with specific legal claims).

98. *See, e.g.*, *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (holding the attorney had a First Amendment right, under standards applicable to commercial speech, to advertise certification as trial specialist by the National Board of Trial Advocacy); *Shapero*, 486 U.S. 466; *In re R.M.J.*, 455 U.S. 191 (1982) (holding Missouri regulation of lawyer advertising unconstitutional).

99. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding Florida rule forbidding mail solicitation of accident victims or their survivors for thirty days after the accident); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding state rule forbidding in person solicitation of automobile accident victims).

100. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.13(a) (2009).

officers, who are not her client.<sup>101</sup> Yet the officers decide the terms of employment for in-house lawyers, including salary, benefits, and assignments. Outside lawyers look to corporate officers for retentions. A dilemma arises if a company's lawyers discover that officers, perhaps top officers, perhaps those with whom they work, are either causing the organization to act unlawfully toward others or violating their legal duties to the organization for personal gain. Since the officers are not the lawyers' clients, we would expect lawyers to take steps to protect the company, which has no legitimate interest in violating the law or in becoming the victim of management illegality.<sup>102</sup> But lawyers will be reluctant to antagonize corporate officers because their jobs, assignments, or retentions depend on their good will.<sup>103</sup> Yet their duty is to protect their client.

As originally adopted, Model Rule 1.13 contained a reporting up requirement and no reporting out requirement.<sup>104</sup> Reporting up means that the lawyer may or must appeal to persons higher and higher in the company in an effort to protect the company from substantial harm. Reporting out means that the lawyer may or must reveal the situation to persons outside the organization if reporting up is unsuccessful. Rule 1.13's reporting up language, adopted in 1983, originally imposed what may be called a "soft" duty to report up and even that duty arose only if the lawyer "knows" of the offending act and the act is "in a matter related to the representation."<sup>105</sup> By definition, then, a tax lawyer who knows of illegal conduct that could lead to great financial harm to the client, but which is unrelated to her tax work, would not be within the mandate. Further, the reporting up duty merely required the lawyer to proceed "as is reasonably necessary in the best interests of the organization."<sup>106</sup> The rule offered several options, including, "if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization."<sup>107</sup> If the highest authority did not remedy the situation, "the lawyer [could] resign in accordance with Rule 1.16."<sup>108</sup>

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101. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.13(a) (2009).

102. *Id.*

103. *Id.*

104. GILLERS ET AL., *supra* note 26, at 171–72. See also Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289 (1987).

105. See MODEL RULES OF PROF'L CONDUCT R.1.13(b), (f) (1983).

106. *Id.* R.1.13(b).

107. See *id.*

108. See MODEL RULES OF PROF'L CONDUCT R.1.13(c) (1983).

This resolution remained unchanged until 2002, when Congress passed what has come to be known as the Sarbanes-Oxley Act (or SOX informally).<sup>109</sup> Sarbanes-Oxley was the most significant federal legislative response to the corporate scandals in the United States, beginning with the collapse of Enron, followed by the indictment, conviction (later reversed), and eventual demise of Arthur Andersen,<sup>110</sup> and unlawful conduct at Tyco, WorldCom, and elsewhere.<sup>111</sup> Section 307 of the Act, which required the SEC to adopt a reporting up rule, provided:

Not later than 180 days after July 30, 2002, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule —

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.<sup>112</sup>

Beyond the mandated reporting up rules, Congress gave the agency authority to adopt other rules governing lawyers who appear or practice before it, including a reporting out rule.<sup>113</sup>

Now, once again, events extraneous to the bar were forcing it to reconsider its professional conduct rules. In anticipation of congressional action following the corporate scandals, the ABA created a Task Force on

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109. 15 U.S.C §§ 7201–66 (2006).

110. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

111. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* §1.6-12(f)(1).

112. 15 U.S.C. § 7245 (2006).

113. The language quoted in the text mandates only the rules identified in paragraphs (1) and (2), but the authority to issue rules governing “attorneys appearing and practicing before the Commission” was not so limited. *Id.* See generally Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 786–87 (2004).

Corporate Responsibility in March 2002.<sup>114</sup> If the ABA and then state courts modified their own rules of professional conduct in a way the SEC approved, the bar could hope that the agency would take a minimalist approach to the authority Congress gave it, doing little or no more than SOX required. Indeed, the Task Force's recommendations to amend Rule 1.13, which the House of Delegates accepted in August 2003, most likely explain the SEC's forbearance from adopting a mandatory reporting out rule.<sup>115</sup>

The amendments to Rule 1.13 are significant but not entirely satisfying. First, they strengthen the reporting up obligation.<sup>116</sup> Although reporting up is not obligatory, it is now presumptively required "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so."<sup>117</sup> Previously, reporting up was simply one option available to the lawyer.<sup>118</sup> Of greater consequence, Rule 1.13 now contains its own exception to confidentiality.<sup>119</sup> It permits, but does not require, reporting out if, after reporting up, "the highest authority . . . insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law," and if, in addition, "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization."<sup>120</sup> However, Rule 1.13 still requires that the lawyer "know[]" of the conduct and that the conduct be in a "matter related to the representation."<sup>121</sup> The patent lawyer who happens to learn about a financial fraud is likely to be exempt from the rule.

## VI. RECENT EXAMPLES THAT QUESTION THE PROFESSIONAL RESPONSIBILITY OF THE LEGAL PROFESSION

The pattern described in Part V has continued into and past the first decade of the current century. I will use three examples. They are the quality of the arguments advanced in rejecting support for a model collaborative law statute or court rule;<sup>122</sup> the successful effort to prevent study and discussion of a rule that would allow non-lawyers to have even

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114. *Task Force on Corporate Responsibility*, AM. BAR ASS'N (Mar. 2002), available at <http://apps.americanbar.org/poladv/letters/107th/business062002/roster.pdf>.

115. GILLERS ET AL., *supra* note 26, at 172–73.

116. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2009).

117. *Id.*

118. See MODEL RULES OF PROF'L CONDUCT 1.13(b) (1983).

119. MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2009).

120. *Id.*

121. *Id.* R. 1.13(b).

122. See discussion *infra* Part VI.A.



limited equity interests in for-profit law firms and the accompanying unsuccessful effort to prevent study and discussion of rules that would permit limited fee sharing between lawyers and non-lawyers;<sup>123</sup> and rejection of a writing requirement for fee agreements.<sup>124</sup> In each instance, I suggest, the ABA (or constituents) have failed to measure up to the high standards that should govern the behavior of lawyers when they engage in the quasi-public task of rulemaking for the legal profession.

#### A. Collaborative Law

What is collaborative law? The National Conference of Commissioners on Uniform State Laws (“National Conference”) uses this definition:

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers (“collaborative lawyers”) during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement (“disqualification requirement”). (citation omitted) Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.<sup>125</sup>

Professor Ted Schneyer further explains:

[Collaborative Law’s] most novel—and controversial—feature is the “four-way” agreement that divorcing spouses and their lawyers sign at the outset, thereby committing themselves to collaborate in a good-faith effort to reach a marital dissolution agreement without resort to litigation. To motivate all four participants to put the prospect of litigation aside and focus on reaching an agreement, a “disqualification” provision limits the scope of the lawyers’ engagements. Each lawyer not only agrees with her client, but also

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123. See discussion *infra* Part VI.B.

124. See discussion *infra* Part VI.C.

125. UNIF. COLLABORATIVE LAW RULES & UNIF. COLLABORATIVE LAW ACT, at Prefatory Note, 1 (2010), available at [http://www.uniformlaws.org/shared/docs/collaborative\\_law/uclranducla\\_finalact\\_jul10.pdf](http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf) [hereinafter UNIF. COLLABORATIVE LAW RULES].

promises the *other* spouse, that the lawyer's engagement will end if negotiations fail and litigation is necessary. Should either spouse choose to end the process and litigate, both will have to retain new counsel or litigate pro se, and neither collaborative lawyer will earn any additional fees in the matter. Thus, each spouse has the power to terminate the other spouse's lawyer-client relationship by ending the process.<sup>126</sup>

While variations are possible, collaborative law's essential feature is an enforceable promise that each party's lawyer will not represent him or her in the event that the collaborative effort fails and the matter goes to court.<sup>127</sup> This promise, in the view of collaborative law practitioners, facilitates informal resolution.<sup>128</sup> In the four-way agreement, each lawyer makes a promise to the other spouse.<sup>129</sup> The debate over the ethics of collaborative law has focused on whether a lawyer making the non-representation promise to the opposing spouse will have a non-consentable conflict of interest between her duty to the opposing spouse and her duty to her client.<sup>130</sup> One bar association has rejected the four-way agreement on that ground,<sup>131</sup> but others, including the ABA's ethics committee, have approved it, citing the rule that allows lawyers to limit the scope of their representation, so long as the clients have given their informed consent.<sup>132</sup>

Collaborative law has achieved prominence, especially as an alternative to litigation in divorce.<sup>133</sup> However, nothing about the collaborative model limits it to matrimonial matters. A few state legislatures and courts have adopted laws or rules regulating and facilitating collaborative law.<sup>134</sup> In

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126. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 290–91 (2008).

127. UNIF. COLLABORATIVE LAW RULES, *supra* note 125, at R. 9 cmt. ("The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law.").

128. Schneyer, *supra* note 126, at 290.

129. *Id.*

130. *Id.* at 314.

131. Colorado Bar Ass'n Ethics Comm., Formal Op. 115 (2007), available at <http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24/>.

132. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007). For links to state opinions, see UNIF. COLLABORATIVE LAW RULES, *supra* note 125, at Prefatory Note, 15.

133. See generally UNIF. COLLABORATIVE LAW RULES, *supra* note 125, at Prefatory Note, 1–16; Schneyer, *supra* note 126, at 289–94 (discussing the increased use of collaborative law in divorce cases).

134. *Fact Sheet on the Uniform Collaborative Law Rules/Act*, A.B.A. SEC. DISP. RESOL., <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act> (last visited Oct. 24,

short, it is a big deal, and, while it is not for everyone, its supporters argue that it has lowered the acrimony and the emotional and financial cost of family dissolution.<sup>135</sup> It offers the possibility of a different model for access to the rule of law, cheaper and with less recrimination.<sup>136</sup> While there will be disagreements over the details of how the process should work, the concept itself should be one the bar would wish to study and perhaps improve and promote.<sup>137</sup>

In 2009, the National Conference produced a Uniform Collaborative Law Act, accompanied by a detailed report that described the history of collaborative law, reviewed scholarship about it, and provided a section by section analysis of the act's provisions.<sup>138</sup> Although in the form of proposed legislation, the Conference wrote that the text of the act could also be put in the form of a court rule.<sup>139</sup> In 2011, the ABA House of Delegates was presented with a resolution to "approve[] . . . the Uniform Collaborative Law Rules/Act . . . as appropriate legislation or rules for those states desiring to adopt the specific substantive law suggested therein."<sup>140</sup> In other words, if a state were interested in legislation or a court rule addressing collaborative law, the ABA would be commending the National Conference's model as an "appropriate" way to do so.

Yet the House of Delegates overwhelmingly rejected the resolution. The vote was 298-154.<sup>141</sup> How could this be? What arguments did the speakers make to justify opposition to an idea that had become popular with so many and was the product of careful study and experience?

In advance of the debate, the Chair of the ABA House of Delegates recounted the relationship between the National Conference and the ABA.<sup>142</sup> The House takes an up or down vote, either approving the model act as

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2012).

135. UNIF. COLLABORATIVE LAW RULES, *supra* note 125, at Prefatory Note, 9–10.

136. See Schneyer, *supra* note 126, at 293–94.

137. See UNIF. COLLABORATIVE LAW RULES, *supra* note 125, at Prefatory Note, 20–21.

138. *Id.*

139. Rachel Zahorsky, *ABA Rejects Proposed Measure for Collaborative Law Guidelines*, A.B.A. J. (Aug. 9, 2011), [http://www.abajournal.com/news/article/the\\_aba\\_house\\_of\\_delegates\\_rejected\\_resolution\\_110b/](http://www.abajournal.com/news/article/the_aba_house_of_delegates_rejected_resolution_110b/).

140. *Id.*

141. *Id.*

142. *Resolution 110B on Collaborative Law Sparks Vigorous Debate but Ultimately Fails (Part 1)*, A.B.A. NOW (Aug. 9, 2011), available at <http://www.abanow.org/2011/08/resolution-110b-on-collaborative-law-sparks-%20vigorous-debate-but-ultimately-fails-part-1/> [hereinafter *Part 1*]. The debate over the Collaborative Law Act was video recorded and placed on the ABA website. References here to arguments in the debate come from the recording, which can be found in three parts. *Id.*; *Resolution 110B on Collaborative Law Sparks Vigorous Debate but Ultimately Fails (Part 2)*, A.B.A. NOW (Aug. 9, 2011), available at <http://www.abanow.org/2011/08/resolution-110b-on-collaborative-law-sparks-%20vigorous-debate-but-ultimately-fails-part-2/> [hereinafter *Part 2*]; *Resolution 110B on Collaborative Law Sparks Vigorous Debate but Ultimately Fails (Part 3)*, A.B.A. NOW (Aug. 9, 2011), available at <http://www.abanow.org/2011/08/resolution-110b-on-collaborative-law-sparks-%20vigorous-debate-but-ultimately-fails-part-3/> [hereinafter *Part 3*].

“appropriate” for states desiring to adopt such a law or disapproving it.<sup>143</sup> The House cannot amend a model act, but approval of a model act does not make its content ABA policy, which apparently means that the Association would not, through a yes vote, bind itself to the exact provisions of the act.<sup>144</sup>

It would be perfectly fitting to reject the resolution if the House believed that the model act was inappropriate, perhaps because of drafting problems. But the debate did not focus on such problems. Rather, speakers voiced three dubious objections to the very idea of collaborative law, sometimes repeating each other:

- The Model Act envisions legislative control of the bar. But “one of the really essential tenets for this Association has been to preserve the ABA as a self-regulating profession. . . . [The Act] is the proverbial camel’s nose under the tent of self-regulation by supporting a draft law that permits legislators to regulate.”<sup>145</sup>
- The Model Act enables “either side [to] disqualify the lawyer on the other side at any time for a good reason, for no reason, or for a bad reason.” This was said to be “so antithetical to the obligations of lawyers . . . so antithetical to the proposition that a client at the beginning of a representation could ever give informed consent to such a procedure, that there is no basis on which we should approve it.”<sup>146</sup>
- The Model Act hurts “very vulnerable people,”<sup>147</sup> and especially women because “the stronger of the clients can displace the lawyer of the weak and, as a result, we would be endorsing a procedure that restores disadvantage to clients [and] in many of the instances alluded to here that’s going to be a women’s issue.”<sup>148</sup>

Let us consider these claims in order.

*Legislative control of the bar.* This objection does not address the wisdom of collaborative law, or the substance of the Model Act, but rather who should adopt a collaborative law scheme—courts or legislatures. Now maybe we would get a better document from the courts than we would from lawmakers. But the claim that the ABA should oppose legislation that regulates lawyers because of resistance to legislative control relies on two myths the profession embraces, at least when convenient. The first is the

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143. Part 2, *supra* note 142.

144. *Id.*

145. *Id.* at 0:30 and 1:54.

146. Part 1, *supra* note 142, at 14:22.

147. Part 2, *supra* note 142, at 11:16.

148. *Id.* at 18:23.

Myth of Judicial Control of the Bar. The second, tied to the first, is the Myth of Lawyer Self-Regulation. Both myths surfaced in the collaborative law debate. Anxiety about legislation anticipates that if lawmakers can regulate the behavior of lawyers, judicial power over the bar will erode. And then the profession's self-regulation will suffer because the political branches will be less deferential to the bar's positions, and its role in the rule of law, than are the courts, which are staffed, of course, with former lawyers. I do not say that there is no risk in giving legislatures power over the bar—a power that, depending on its nature, lawmakers may exercise for political motives unrelated, or even harmful, to the fair administration of justice. But I do say that lawmakers nationwide now share with courts power to make rules governing the conduct of lawyers. Legislation governing lawyers is legion.<sup>149</sup>

We should be wary of arguments based on the source of a regulation because they can be invoked selectively to disguise opposition to substance. An innovation should be assessed on its merits, which may include the source, but the source should not be categorically dispositive. Even where opposition to the source is justified, if the idea has merit, it should be pursued through other channels. Nor does legislative power exclude opportunity for lawyers to influence the laws that legislators adopt. Lawyers can lobby lawmakers just as they lobby judges (although they do not then use the word “lobby”). The complexity and length of some regulations, furthermore, may make them inappropriate for a court rule. At the very same meeting at which opponents of collaborative law warned against the dangers of legislative control, the House approved “A Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings.”<sup>150</sup> This Act was written and supported by ABA entities.<sup>151</sup> A lengthy provision details the duties, to be legislatively imposed, that lawyers owe minor clients.<sup>152</sup> There is nothing remarkable in this description. The

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149. A list of citations might consume this entire volume. See, e.g., N.Y. JUD. LAW § 474 (McKinney 2012) (“Compensation of attorney or counselor”); § 474-a (“Contingent fees for attorneys in claims in actions for medical, dental or podiatric malpractice”); § 476-a (“Action for unlawful practice of law”) (in part defining “unlawful practice of the law”); § 491 (“Sharing of compensation by attorneys prohibited”); § 493 (“Attorneys forbidden to defend criminal prosecutions carried on by their partners, or formerly by themselves”); and § 495 (“Corporations and voluntary associations not to practice law”). See also CAL. BUS. & PROF. CODE § 6068 (West 2012) (“Duties of attorney”); § 6147 (governing contingency fee agreements); § 6148 (covering non-contingency fee agreements); and §§ 6157–59.2 (detailed rules on legal advertising). In addition, legislation in many places is the source of the attorney-client privilege, which goes to the essence of the bar's identity. See, e.g., FLA. STAT. ANN. § 90.502 (West 2012).

150. *Report to the House of Delegates*, AM. BAR ASS'N, SECTION OF LITIGATION (2011), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1350503066101a.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1350503066101a.pdf).

151. *Id.* at 1 (listing the fourteen entities supporting the Act).

152. Section 7 of the Act provides:

(b) The duties of a child's lawyer include, but are not limited to:

(1) taking all steps reasonably necessary to represent the client in the proceeding.

complexity of the Act made it more amenable to legislation than to court rule. What is remarkable, however, is that the House approved ABA-inspired legislation imposing duties on lawyers at the same time that it was urged to (and did) reject other legislation because it imposed duties on lawyers.<sup>153</sup>

*The disqualification issue.* The objection that collaborative law enables “either side [to] disqualify the lawyer on the other side at any time for a good reason, for no reason or for a bad reason”<sup>154</sup> is not even an argument. It is merely a description of the premises of collaborative law, though provocatively stated. It says nothing about why this result is objectionable.<sup>155</sup>

As stated, lawyers may sign the collaborative agreement along with their

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including but not limited to: interviewing and counseling the client, preparing a case theory and strategy, preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders, and such other steps as established by the applicable standards of practice for lawyers acting on behalf of children in this jurisdiction;

(2) reviewing and accepting or declining, after consultation with the client, any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;

(3) taking action the lawyer considers appropriate to expedite the proceeding and the resolution of contested issues;

(4) where appropriate, after consultation with the client, discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state;

(5) meeting with the child prior to each hearing and for at least one in-person meeting every quarter;

(6) where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the best interests advocate;

(7) prior to every hearing, investigating and taking necessary legal action regarding the child's medical, mental health, social, education, and overall well-being;

(8) visiting the home, residence, or any prospective residence of the child, including each time the placement is changed;

(9) seeking court orders or taking any other necessary steps in accordance with the child's direction to ensure that the child's health, mental health, educational, developmental, cultural and placement needs are met; and

(10) representing the child in all proceedings affecting the issues before the court, including hearings on appeal or referring the child's case to the appropriate appellate counsel as provided for by/ mandated by [inset local rule/law etc].

ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7(b), *available at id.* at 6–7 (footnote omitted).

153. *Executive Summaries*, AM. BAR ASS'N, HOUSE OF DELEGATES (2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/2011\\_hod\\_annual\\_meeting\\_executive\\_summaries\\_index.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2011_hod_annual_meeting_executive_summaries_index.authcheckdam.pdf).

154. *See supra* note 146 and accompanying text.

155. Furthermore, the statement ignores the fact that a very good reason may motivate the parties to give their opponents the ability to disqualify their lawyer, namely the wish to conclude a dispute without the expense and anxiety of litigation.

clients or the clients alone may sign, promising each other not to use the same lawyer in the event of litigation. Either way, the client is giving up a right to counsel of choice in exchange for something else. A lawyer would, of course, have to explain all of this to the client, whatever the form of the non-representation promise, laying out the advantages and disadvantages and advising on the wisdom of the agreement under the circumstances. If a non-representation promise is deemed a non-waivable conflict only if lawyers make the promise along with the clients—which is the assumption behind the Colorado opinion,<sup>156</sup> but rejected elsewhere—then clients can circumvent the impediment of non-waivability through client-client agreements, assuming courts will enforce them.<sup>157</sup> If they will not, then *a fortiori* they will not enforce a four-way agreement either. If a non-representation agreement is ethically impermissible under all circumstances, it spells the death of collaborative law as its proponents envision it because collaborative law is premised on assurances to clients that the adverse lawyer will not later oppose them in court.

I realize that arguments to the House of Delegates are subject to time constraints. But even so, I don't see how an objection based on the ability of an opposing client to disqualify counsel can be defended even if opponents had all the time in the world. The counseled client will have agreed to that result for reasons that will appear beneficial to many. Unless an enforceable bilateral non-representation agreement (i.e., one between the clients alone) does the trick, forbidding the lawyer's promise paternalistically denies the client an option that many will rationally choose in order to increase the chances of staying out of court. Categorically forbidding the client's informed consent to do that presumes, with no support at all, that no fully counseled, competent adult could, at the outset "of a representation . . . ever give informed consent to such a procedure."<sup>158</sup> Clients must be protected from themselves. The result is a "my way or the highway" choice, except that there is no highway.

Furthermore, denying the opponent the power to prevent representation in court by forbidding lawyers to sign a non-representation agreement does not empower the client. It empowers only the lawyer. A lawyer may properly agree with a client to limit the scope of his representation.<sup>159</sup> So a

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156. See *supra* note 131 and accompanying text.

157. See *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, 53 F. Supp. 2d 338 (E.D. N.Y. 1999) (upholding an agreement among parties that one would not use particular counsel in designated matters). New York courts have enforced anti-solicitation promises and confidentiality obligations in settlement agreements by disqualifying the lawyers who agreed to them. See Stephen Gillers & Richard Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291, 301–06 (2005). *Mandell v. Mandell*, 949 N.Y.S.2d 580 (Sup. Ct. 2012), recognizes as open the question of the enforceability of an agreement not to use collaborative law counsel in the event of litigation, but does not answer it.

158. See *supra* note 146 and accompanying text.

159. MODEL RULE OF PROF'L CONDUCT R.1.2(c) (2009).

lawyer and an informed client could agree that the lawyer will not represent the client in court if the collaborative effort fails. Of course, the lawyer can change his mind, which he could not do if a promise to the opponent (by either lawyer or client) were binding. But if a binding promise is not allowed, the effect is to give lawyers sole veto power regardless of what the client may wish. And any lawyer who wants repeat collaborative law work may decline to go to court even if the client wants him to do so because, if he does not decline, no future opponent who knows of the lawyer's conduct will rely on an agreement of a limited scope of representation as sufficient insurance against subsequent litigation adversity.

To be sure, Rule 5.6(b), which the opponents did not cite, forbids lawyers to promise, as part of a settlement or "employment, or other similar type of agreement," to restrict her right to practice.<sup>160</sup> But the collaborative agreement is not part of a settlement and the lawyer will have accepted no greater limitation than that imposed by the client's own agreement limiting the scope of work for the client herself, as Rule 1.2(c) permits. The comment to the rule, furthermore, tells us that the rule is meant to ensure the lawyer's availability to "other persons."<sup>161</sup>

*Collaborative law hurts the weaker litigant, especially women.* This is a more specific example of the paternalism that animates the prior argument, except that this argument relies on a prediction of the consequences of a collaborative law regime for more vulnerable clients and apparently all women. Women and vulnerable clients need to be protected, goes the claim, from the risk that they might elect collaborative law and regret it later when they have to hire new counsel to litigate and lack the resources to do so. A devious party may, in this imagining, go through the collaborative motions with no intention of reaching an agreement but with the secret goal of weakening the opponent's resolve and depleting her resources. The duped client will then have to pay new counsel. An unspoken but dubious assumption is that the collaborative lawyer, if free to do so, would be willing to continue to represent the client in litigation without further fee, whereas a new lawyer will expect to get paid.<sup>162</sup> The same arguments could be made against mediation, in which an unscrupulous opponent can feign interest in order to deplete the other side's resources and stamina, and which, when mediation fails, will require an expanded retainer and more fees to continue

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160. MODEL RULE OF PROF'L CONDUCT R. 5.6(a)–(b) (2009).

161. *Id.* R. 5.6 cmt. 2.

162. UNIF. COLLABORATIVE LAW RULES, *supra* note 125, at R. 10(b) (would permit another lawyer in the collaborative lawyer's firm to represent the client without fee in limited circumstances).



the representation. As too often happens in these debates, the speakers who foresaw that collaborative law would harm women or vulnerable clients in this way, and should therefore be categorically forbidden to everyone, ventured no empirical support for their prediction. They just said it.

Collaborative law may be a good idea or a bad one on its merits. And the Model Act may or may not properly resolve the competing policies. But the argument against the Model Act ignored its content and instead opposed the very idea. It did so with arguments that fall apart upon even casual inspection, arguments that no lawyer jealous of her reputation at the bar would make in an appellate brief and no advocate in the House of Delegates should ask its members to accept.

As a practical matter, nothing will turn on the ABA's refusal to support the Model Act. Collaborative law has a momentum of its own.<sup>163</sup> It will succeed or fail depending upon its popularity, which will in turn depend on the experience of clients and lawyers who elect it. No lawyer has been disciplined for participating in collaborative law or is likely to be. But the fact that the ABA's collaborative law vote makes no difference to the future of the innovation does not make the vote irrelevant. It offers further evidence of the need for improvement in how the Association makes policy so that it can be a serious contributor to an important conversation about dispute resolution, rather than just saying no. Perhaps the Association will yet summon the considerable expertise of its members and propose an enlightened system of collaborative law, whether through statute or court rule.

#### *B. Non-Lawyers in Law Firms: The Illinois and Senior Lawyers Resolution*

In some nations of the world<sup>164</sup> and in Washington, D.C.,<sup>165</sup> non-lawyers

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163. See, e.g., Susan McRae, *Collaborative Divorce Booms as Method to Ease the Parting*, L.A. DAILY J., July 13, 2007, at A1 (referring to the national and international growth of collaborative divorce).

164. See Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 1010–11 (2012) (footnotes omitted):

As of March 2009, England and Wales have allowed what are called Legal Disciplinary Practices ("LDPs"). Solicitors, barristers, notaries, conveyancers, and others, including certain foreign lawyers and nonlawyers, may combine in an LDP. Nonlawyers must be found "suitable" by the Solicitors Regulation Authority, which can also withdraw approval. Nonlawyer ownership of a firm is capped at twenty-five percent. An LDP can practice only law. Passive investors are not allowed. By 2012, the U.K. anticipates that it will go further and allow what has come to be known as Alternate Business Structures ("ABS"). An ABS may have passive investors (sometimes called Tesco law in the expectation that retailers will create law firms to provide routine services to consumers). Shares in an ABS can be publicly traded. An ABS can offer multidisciplinary services, not just legal services. Once the ABS structure is approved, there will be no further need for a separate LDP category.

165. D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007) permits nonlawyers (without limit on

may have equity interests in firms that offer legal services. The models for non-lawyer ownership vary. The most conservative model would (with certain restrictions) allow non-lawyers who actively assist a law firm in providing legal services to clients to have an ownership interest. This is the rule in Washington, D.C.<sup>166</sup> At the other end of the spectrum is passive investment in law firms.<sup>167</sup>

In 2000, the ABA House of Delegates, in rejecting proposals from the Multi-Disciplinary Practice (“MDP”) Commission, resolved in part:

6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.
7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.<sup>168</sup>

The MDP Commission had been appointed to study whether and through whom a law firm could offer services in addition to legal services—therefore *multi-disciplinary*.<sup>169</sup>

In 2009, Carolyn Lamm, the ABA president, appointed a commission, thereafter formally known as the Commission on Ethics 20/20, to study whether and how the rules governing the profession should be amended in

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number) to have a “financial interest” in a law firm if the nonlawyer “performs professional services which assist the [firm] in providing legal services to clients”—that is, is not a passive investor—so long as the nonlawyer agrees to “abide by [the D.C.] Rules of Professional Conduct” and the lawyers in the firm “undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1.” Rule 5.1 describes the responsibility of firm partners to supervise the firm’s lawyers. *Id.* R. 5.1.

166. *Id.*

167. See Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 628 (2011).

168. *MDP Recommendation – Center for Professional Responsibility*, ABA CENTER FOR PROF. RESP., [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdprecom10f.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html) (last visited Oct. 24, 2012).

169. *Commission on Multidisciplinary Practice*, ABA CENTER FOR PROF. RESP., [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdp\\_abt\\_commission.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_abt_commission.html) (last visited Oct. 24, 2012).

light of globalization and advances in communication technology.<sup>170</sup> Among the dozens of issues the 20/20 Commission resolved to study—all of which were publicly disclosed as part of its agenda within months of its creation—was the permissible scope of non-lawyer participation in for-profit law firms.<sup>171</sup> Obviously, the 2000 resolution could be seen to foreclose consideration of that question if it remained the policy of the Association. But it was now nine years later. The 20/20 Commission was charged to examine the effects of intervening changes on professional regulation.<sup>172</sup> A premise of serious intellectual inquiry is that questions are always open to re-examination to correct error or when changing conditions warrant. That doesn't mean the answers will come out differently. It means only that few if any decisions are final.

In December of 2011, the 20/20 Commission released a report and discussion draft that would allow limited non-lawyer ownership in law firms.<sup>173</sup> The Commission took no position on the issue but invited comments. The issue of non-lawyer ownership had by then acquired its own acronym—Alternate Business Structures or ABS. The ABS model discussed in the Commission's release was narrow. It required that the firm practice only a single discipline—law—and that the extent of non-lawyer interest be capped at twenty-five percent.<sup>174</sup> Other restrictions are identified below.<sup>175</sup> In view of the exaggerated reactions that any talk of this issue

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170. *About Us, ABA Commission on Ethics 20/20*, ABA CENTER FOR PROF. RESP., [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/about\\_us.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html) (last visited Oct. 24, 2012); *ABA Commission on Ethics 20/20*, ABA CENTER FOR PROF. RESP., [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited Oct. 24, 2012). I am a member.

171. *ABA Commission on Ethics 20/20 Preliminary Issues Outline*; ABA COMM'N ON ETHICS, at 6 (Nov. 19, 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/preliminary\\_issues\\_outline.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf).

172. *Id.*

173. Letter from Jamie S. Gorelick & Michael Traynor, Co-Chairs ABA Commission on Ethics 20/20, to ABA Entities, Courts, Bar Associations, Law Schools, and Individuals (Dec. 2, 2011), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111202-ethics2020-discussion\\_draft-alps.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf).

174. *Id.*

175. *Id.* The pertinent text in the draft, amending Rule 5.4(b), read as follows with new language underscored.

(b) ~~A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.~~ A lawyer may practice law in a law firm in which individual nonlawyers in that firm hold a financial interest, but only if:

- (1) the firm's sole purpose is providing legal services to clients;
- (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
- (3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;
- (4) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under Rule 5.1;
- (5) the nonlawyers have no power to direct or control the professional judgment of

seems to incite, I stress these restrictions. Nothing in the discussion draft envisioned passive investment in or corporate ownership of law firms.

Two related issues on the Commission agenda concerned fee splitting with non-lawyers. First, to what extent can a law firm in a jurisdiction that does not allow non-lawyer owners or partners agree to divide fees with a different firm that has non-lawyer owners or partners in a jurisdiction that does allow them (interfirm division of fees); and second, to what extent can a law firm's office in the first jurisdiction share fees with a second office of the same firm in a jurisdiction that does allow (and which has) non-lawyer owners or partners (intrafirm sharing of fees). These two questions also acquired an acronym: Alternative Law Practice Structures or ALPS.<sup>176</sup>

In March 2012, the Illinois State Bar Association ("ISBA") and the Senior Lawyers Division of the ABA filed a resolution for consideration at the August 2012 Annual Meeting of the ABA.<sup>177</sup> The report supporting the resolution left little doubt in the view of members of the Commission that it was intended to stop discussion of ABS and ALPS even before the Commission had decided whether to make recommendations addressing either, or, if so, what the recommendations might say.<sup>178</sup> The resolution provided:

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a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;

(6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results; and

(7) compliance with the foregoing conditions is set forth in writing.

*Id.* at 1–2.

176. *Initial Draft Proposal for Comment: Choice of Law-Alternative Law Practice Structures*, ABA COMM'N ON ETHICS 20-20 (Dec. 2, 2011), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111202-alps\\_choice\\_of\\_law\\_r\\_and\\_r\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf). This proposal would have required amendments to Rule 1.5 and Rule 5.4. The Commission eventually decided not to propose interfirm division of fees or intrafirm fee sharing, leaving it to the Standing Committee on Ethics and Professional Responsibility ("SCEPR") to address the propriety of each activity under the current rules. *Ethics 20/20 Recommends Helping Foreign Lawyers to Practice in US, Sidesteps Nonlawyer Ownership*, ABA Journal, Oct. 30, 2012, [http://www.abajournal.com/news/article/ethics\\_20\\_20\\_recommends\\_making\\_it\\_easier\\_for\\_foreign\\_lawyers\\_to\\_practice\\_in/](http://www.abajournal.com/news/article/ethics_20_20_recommends_making_it_easier_for_foreign_lawyers_to_practice_in/).

177. *Report to the House of Delegates*, ILL. STATE BAR ASS'N, SENIOR LAWYERS DIVISION, at 4, available at <http://www.abanow.org/2012/06/2012am10a/>.

178. *Id.*

RESOLVED, That the American Bar Association reaffirms the following policy, adopted July 2000:

The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.<sup>179</sup>

In supporting the resolution, the report of the ISBA and the Senior Lawyers Division stated:

The Commission has indicated that it intends to continue its consideration of the previously recommended amendments to Model Rule 1.5 and 5.4 which if adopted would change the current policy. Because of that intention, it is imperative that the House give its guidance and unambiguous direction as to how the Commission should proceed. A reaffirmation of the existing policy will make it clear that any forthcoming proposal should meet the test of the policy reaffirmed. The proposals that have been offered for consideration have been given great public distribution encouraging the public perception that the profession is interested in allowing nonlawyers to invest in and own law firms. The American Bar Association should wait no longer to make it clear to the public that this is not going to happen. The *evils* of fee sharing with nonlawyers in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.<sup>180</sup>

Thereafter, in April 2012, Jamie Gorelick and Michael Traynor, the co-chairs of the 20/20 Commission, announced that the Commission was abandoning discussion of a rule that would permit non-lawyer ownership of law firms (ABS).<sup>181</sup> However, it would continue to study the two issues subsumed under ALPS, i.e., fee division with a different law firm that has

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179. *Id.*

180. *Id.* at 4 (emphasis added)[hereinafter *ISBA Report*].

181. *ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms*, ABA NOW (Apr. 16, 2012), <http://www.abanow.org/2012/04/aba-commission-on-ethics-2020-will-not-propose-changes-to-aba-policy-prohibiting-nonlawyer-ownership-of-law-firms/> (last visited Oct. 24, 2012) [hereinafter *ABA Commission on Ethics 20/20*].

non-lawyer partners in a jurisdiction that allows it and fee sharing between two offices of the same firm where one of the offices is located in such a jurisdiction and has non-lawyer partners.<sup>182</sup> In August 2012, the ISBA and Senior Lawyers' resolution came before the ABA House of Delegates.<sup>183</sup> In a defeat for the proponents of the resolution, a motion was made to postpone it indefinitely, which passed 2-1.<sup>184</sup>

I accept that the sponsors of the resolution had the best interests of the profession at heart, but the resolution was ill-advised for several reasons. First, the timing. Dozens of lawyers, commissioners, liaisons from other organizations and from within the Association, and witnesses had been working for three years on these issues. That ABS and ALPS were on the Commission's agenda was no secret.<sup>185</sup> Further, the issues fell within the charge to the Commission, namely to study the effects of technology and globalization on lawyer regulation.<sup>186</sup> If there was a time to foreclose an investigation, it would have been at the formation of the Commission, not after three years of work by others. Furthermore, the ongoing conversation posed no risk to the resolution's sponsors. They could mobilize to defeat a later Commission recommendation on the subject if any was made.

That leads to a second criticism of the resolution, which is even more serious than the timing. The sponsors apparently saw harm in the mere discussion of the issues. This is the very opposite of the open and independent inquiry that the public, the bar, and the courts have a right to expect from any profession, but especially one that prizes investigation and fact-gathering and that is exercising a quasi-public duty. The proposition that certain regulatory ideas are too repugnant even to allow discussion by an ABA body is intellectually unacceptable and harms the good work of the Association.

The resolution's third deficiency is the absence of evidence and analysis. Invoking the phrase "core values" is not a substitute for reasoned dialogue, although unfortunately it seems at times to serve as one. If any core value is present here, it is the value of awaiting receipt of all the

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182. *Id.* As stated, even these ideas were eventually dropped in favor of referrals to SCEPR. *See supra* note 176.

183. *ISBA Raises Issue of Nonlawyer Ownership of Law Firms Before ABA House of Delegates*, ILL. STATE BAR ASS'N, <http://iln.isba.org/blog/2012/08/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates> (last visited Oct. 24, 2012).

184. There was no official headcount. Proponents and opponents were asked to stand. I was present and I estimate that there was a 2-1 vote to postpone. Others with whom I spoke confirmed this estimate.

185. *See supra* note 171 and accompanying text.

186. *See supra* note 170 and accompanying text.

evidence before passing judgment.<sup>187</sup> Even worse, the label “evils” in the sponsor’s report substitutes name-calling for argument and has no place in the policymaking responsibilities of the Association. If the Commission were to make a recommendation on ABS or ALPS, it would be accompanied by a report explaining the factual and legal support for it. But the resolution’s sponsors preferred to substitute “evils” and save all that work. They offer no analysis, no research. There is no citation to the one bar ethics opinion that concluded that a law firm *could* divide legal fees with another firm notwithstanding that the second firm had a non-lawyer partner in a jurisdiction that allowed it.<sup>188</sup> There is no explanation of the line of causation that leads to the assertion that any ALPS and ABS proposal threatens a “core value” of the profession. There is no analysis of the ABA ethics committee opinion<sup>189</sup> that has addressed how law firms with offices in both jurisdictions allowing non-lawyer partners and jurisdictions disallowing them might properly operate under current rules. There is no recognition that even today non-lawyers can be compensated entirely through a profit sharing plan<sup>190</sup> or how this authority should influence the closely related matter of participation in fees. As the Wisconsin Supreme Court recently recognized in allowing non-lawyer participation in income from specific cases, fees are the main or only ingredient in law firm profits.<sup>191</sup> There is no cognizance of the possibility that in the dozen years since the 2000 ABA resolution quoted above,<sup>192</sup> new evidence might commend a different result, or that, at least, this question is worth study by those with a public responsibility. That indeed is what the Commission was charged to do, but apparently the sponsors had no interest in the fruits of its ongoing investigation. Why let investigations get in the way of belief? It was enough to say that the very prospect of fee sharing in any form perpetuates an “evil” and leave it at that. Better to just shut it down.

Boiled down to its essentials, the ISBA and Senior Lawyers Division disregarded what is (or should be) a bedrock principle. It is that lawyers should not make arguments for or against a position on the rules governing lawyers without serious legal analysis of a quality that a judge would put in an opinion or a lawyer would be proud to put in a brief. The ISBA and

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187. I pass over the affront of describing as “evil” any form of law firm ownership by a non-lawyer.

188. Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2010-7 (2010), *available at* [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2010-7Final.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2010-7Final.pdf).

189. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 360 (1991).

190. *See* MODEL RULES OF PROF’L CONDUCT R. 5.4(a)(3) (2009).

191. *In re* Disciplinary Proceedings Against Weigel, 817 N.W.2d 835 (Wis. 2012).

192. *See Multidisciplinary Recommendation*, AM. BAR ASS’N, ET AL., [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdprecom10f.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html) (last visited Oct. 24, 2012).

Senior Lawyers resolution ignored this principle. We could and should say that the House vote not to interrupt the work of the Commission despite the alarm with which American lawyers may or may not view the prospect of non-lawyer participation in legal fees reflects well on the body and the profession. But the fact remains that one out of three House members was willing to stifle the investigation before it even reached conclusions on issues it was asked to address; and two venerable groups—the ISBA and the Senior Lawyers—lobbied hard to do so, using arguments and an epithet that should have no place in serious discourse.

*C. Written Fee Agreements*

Rule 1.5(b) states:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.<sup>193</sup>

Why is a written communication merely preferable? Why aren't lawyers required to communicate fee changes in writing?

Twice, ABA commissions recommended that written agreements should be required with a few minor exceptions.<sup>194</sup> Twice, the Association's House of Delegates turned the requirement into a mere preference.<sup>195</sup> A writing stating the client's financial obligations (including for expenses) and the scope of work is good for clients. It avoids misunderstanding and different recollections. It poses no apparent disadvantage. So it would seem that the bar should quickly endorse the requirement. Yet the ABA has not. Why not?

A harsh explanation is that lack of clarity is good for lawyers. In the

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193. MODEL RULES OF PROF'L CONDUCT R 1.5(b) (2009).

194. GILLERS ET AL., *supra* note 26, at 62–63. The Reporters' Explanation for that recommendation as part of the Ethics 2000 Commission's work states: "Few issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer. . . . The Commission believes that the time has come to minimize misunderstandings by requiring the notice to be in writing . . ." with minor exceptions. ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 91 (2006) [hereinafter A LEGISLATIVE HISTORY].

195. *Id.*



event of later disagreement, lawyers will be in a better position to prevail. A fee dispute that lands in court or arbitration means the client will ordinarily need to hire new counsel and a lack of a writing increases the likelihood of a need for (a costly) trial. While this may not trouble powerful clients, it will be a significant impediment for small businesses and most individuals. Institutional clients (the Fortune 500, say) have in-house counsel and know enough to insist on a written agreement and have leverage to get one. Or they write their own. They are repeat users of legal services whom lawyers do not wish to antagonize.

That's the harsh explanation. A less harsh explanation for the absence of a writing requirement posits that it is often not possible to know what the fee arrangement or scope of work will be when a matter begins because there are too many uncertainties. But this explanation is wrong because the rule itself says that the "scope of the representation and the basis or rate . . . shall be communicated" at the outset of the matter.<sup>196</sup> The rule already assumes that lawyers know enough in the beginning to provide this information and must do so. If there are contingencies that may affect the representation and cannot then be known, they can be described. The rule also acknowledges the possibility of a need for changes and provides that these "shall also be communicated to the client."<sup>197</sup> But, again, they need not be in writing.

A third explanation, and one that was voiced when the writing requirement was removed the first time around, is that it would subject a lawyer who forgot to provide a written fee agreement to professional discipline.<sup>198</sup> This explanation is unconvincing. Writing requirements appear many places in the Model Rules. Contingent fee agreements must be in writing.<sup>199</sup> In 2002, when the ABA rejected a written fee agreement for the second time, it also required that consent to various lawyer conflicts be "confirmed in writing."<sup>200</sup> A written agreement is required when two lawyers in different firms divide fees.<sup>201</sup> There are writing requirements for business transactions and financial agreements between lawyers and clients.<sup>202</sup> Aggregate settlements must be in writing.<sup>203</sup> Failure to have a writing in these circumstances can also, at least in theory, lead to discipline.

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196. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2009) (emphasis added).

197. *Id.*

198. The State Bar of Michigan moved for the inclusion of the word "preferably" because of "concern that imposing a writing requirement would result in disciplinary action against a lawyer who failed to have a written agreement." A LEGISLATIVE HISTORY, *supra* note 194, at 80.

199. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009).

200. *See, e.g., id.* R. 1.7(b)(4), 1.9(b).

201. *Id.* R. 1.5(e).

202. *Id.* R. 1.8(a).

203. *Id.* R. 1.8(g). This rule also requires a writing for an aggregate agreement to plead guilty or nolo contendere. *Id.*

So why balk at a writing requirement for non-contingent fee agreements? Furthermore, lawyers who do not provide a written fee agreement in jurisdictions that require them are in fact not disciplined.<sup>204</sup> They may not then be able to enforce their oral agreement and may be relegated to quantum meruit.<sup>205</sup> Similarly, lawyers who fail to follow the writing requirements for division of fees may recover in quantum meruit.<sup>206</sup> They are not disciplined.<sup>207</sup>

Unfortunately, we are left then with the first, harsh explanation. Lawyers may not want to put the scope of work and the client's financial obligations in writing for whatever advantage lack of clarity may appear to afford lawyers, and notwithstanding the unalloyed benefit to clients, especially small clients.<sup>208</sup> Of course, this is not true for all lawyers, many of whom see a written fee agreement as beneficial to them as well.<sup>209</sup>

If the professional responsibility of the legal profession is to protect the interests of clients ahead of those of lawyers, unless the balance of advantage substantially favors the interests of the lawyers, there is no better example of the failure of this duty than the rejection of a mandatory written agreement describing the client's fee obligations and the scope of work. Lawyers have advanced no valid reason to reject a writing requirement and clients have good reason to want it. Some courts agree. At least ten jurisdictions, including California, New Jersey, New York, Pennsylvania, and Washington, D.C., generally require a written fee agreement.<sup>210</sup>

#### VII. WHEN THE INTERESTS OF LAWYERS AND CLIENTS CLASH: THE REBUTTABLE PRESUMPTION

As between the interests of lawyers and those of clients, when the bar proposes rules governing lawyers, it is client interests that should presumptively control. But it is a presumption only because lawyers do have legitimate interests in their own right, like career development and mobility.

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204. See, e.g., *Starkey, Kelly, Blaney, & White v. Estate of Nicolaysen*, 796 A.2d 238 (N.J. 2002) (allowing quantum meruit despite failure to reduce contingent fee agreement to writing).

205. *Id.*

206. *Huskinson & Brown, LLP v. Wolf*, 84 P.3d 379 (Cal. 2004) (holding that a lawyer may recover quantum meruit).

207. *Id.* It would be exceedingly odd for a court that believed a lawyer deserved discipline for failure to reduce a fee agreement to writing as required by the court's rule nonetheless to reward the lawyer with a quantum meruit recovery.

208. Lawrence A. Dubin, *Client Beware: The Need for a Mandatory Written Fee Agreement Rule*, 51 OKLA. L. REV. 93, 102-03 (1998).

209. *Id.*

210. See GILLERS ET AL., *supra* note 26, at 63-68.

Whether and to what extent lawyers must subordinate these interests to those of clients should depend on the strength of the relative interests. The presumption can be rebutted.

Screening is an example of a rule in which the presumption was rebutted.<sup>211</sup> The question arises when a lawyer who is personally conflicted in a matter moves from one private law office to another.<sup>212</sup> Is her conflict imputed to other lawyers in the new firm? If so, lawyer mobility is hindered. Or should we instead allow the new firm to screen this lateral lawyer on arrival and thereby avoid imputation?<sup>213</sup> From the perspective of a client who does not benefit from the lawyer's move to a new firm, screening should not be allowed. That avoids any risk that the lateral lawyer will reveal, even if unintentionally, confidential information that the lawyer's new firm can then use adversely to the client. But if the screening procedures can be formidable enough to significantly reduce that risk, perhaps the interest in lawyer mobility should prevail.<sup>214</sup> This is actually a bit more complicated because on the pro-screening side of the ledger are the interests of those of the lawyer's other clients who would benefit from the lawyer's move to the new firm.<sup>215</sup> But whether or not there are other such clients, the screening question offers one circumstance where the presumption in favor of a client's interests can be, and has been, rebutted.<sup>216</sup>

#### VIII. HOW TO IMPROVE THE BAR'S CONTRIBUTION TO SELF-REGULATION

I offer a few simple ways in which the profession can credibly fulfill its public responsibility to the courts and the system of justice when it proposes rules governing the conduct of lawyers.

##### *A. Intellectual Quality*

The standards for arguments for or against a rule should be as high as the standards for argument in judicial opinions, law review articles, and briefs to courts. That includes footnote support for all claims of fact or law and for predictions about the probable effect of a rule.

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211. Amanda Kay Morgan, *Screening Out Conflict-Of-Interest Issues Involving Former Clients: Effectuating Client Choice and Lawyer Autonomy While Protecting Client Confidences*, 28 J. LEGAL PROF. 197, 198 (2003–2004).

212. *Id.*

213. *Id.* at 199.

214. *Id.*

215. *Id.*

216. In 2009, the ABA amended Rule 1.10 to allow screening in these circumstances conditioned on various notice requirements to assure compliance with the screen. See GILLERS ET AL., *supra* note 26, at 149–50.

*B. Empirical Predictions*

Any factual prediction of dire or beneficial consequences if a rule is or is not adopted should be supported with credible empirical research if possible. Who would do it? The bar might investigate the availability of experts on empirical research—which includes academic lawyers—who might be willing to help without charge. If the claim is that the particular prediction is not susceptible to empirical proof or that conducting an empirical investigation would be too costly, that fact should be candidly acknowledged. Or the claim may be that because the intuitive likelihood of the prediction is sufficiently great, it should be presumed correct.<sup>217</sup>

The empirical issue may be more subtle. It may be that the truth or falsity of the prediction of harm cannot easily be verified (or verified at all), but that the level of harm if the prediction is correct but ignored is greater than the level of harm if the prediction is adopted but wrong. Therefore, the burden of disproving the prediction should lie with its opponents. If that is the claim—and it may be perfectly plausible in a particular circumstance—it should be identified explicitly. For example, opponents of an exception to confidentiality may predict that it will impede client candor to such an appreciable extent that whatever good the exception affords in protecting others will be dwarfed by the harm it will cause. Yet the prediction may be incapable of proof.

Or consider the proposals for division of fees that so exercised the ISBA and the Senior Lawyers Division.<sup>218</sup> Their resolution states, “the sharing of legal fees with nonlawyers, and nonlawyer ownership or control of law firms directly and adversely impacts core values of the U.S. legal profession, including but not limited to, the exercise of independent professional judgment and regulation by the judicial branch of government.”<sup>219</sup> None of this is explained or substantiated. If the resolution’s sponsors wish to predict dire consequences if a law firm is permitted to divide legal fees with another

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217. The American Bar Foundation might be a good source of help with specific questions. The Foundation produces much research and scholarship but its work is not focused on, and is at best incidental to, the kinds of questions that I imagine a future committee will ask. *See infra* Part IX; *see also Research*, AM. BAR FOUND. (2012), <http://www.americanbarfoundation.org/research/index.html> (last visited Oct. 24, 2012).

218. *See supra* note 176 and accompanying text.

219. *Illinois State Bar Association Resolution Opposing Certain ABA Ethics 20/20 Proposals And/Or Working Drafts of Proposals and Affirming and Re-Adopting Policy on Fee Sharing and Non-Lawyer Ownership and Control of Law Practices*, ILL. STATE BAR ASS’N, at 4 (Mar. 19, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/isba\\_comments\\_alpsdiscussiondraftandalpschoiceoflawinitialdraftproposal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/isba_comments_alpsdiscussiondraftandalpschoiceoflawinitialdraftproposal.authcheckdam.pdf).

firm (or an office of the same firm) that has non-lawyer partners in a jurisdiction whose rules allow it, or if firms are allowed to have non-lawyer partners, they should be expected empirically to support their prediction with more than *ipse dixit*. If they cannot, they should admit it and either withdraw their opposition or make a persuasive case that the likelihood of harm is great enough that the risk should not be run or that, in any event, the proponents of the proposal should shoulder the burden of proof (a subject next addressed). The proponents, meanwhile, may point to jurisdictions in which the favored rule, or one like it, has worked without incident.

### C. Burden of Proof

Almost entirely absent from debates over lawyer ethics rules is an effort to identify where to put the burden of proof when a rule is proposed or opposed. Burden of proof is a concept with which lawyers have much familiarity, of course, and it is necessarily implicated in any discussion of the effect of a rule. So its absence from debates is odd. Often, if not always, there should be a threshold decision of where the burden resides, a decision that can be decisive if empirical proof is elusive. (I put aside the weight of that burden.)

Implicitly at least, burden of proof shows up in the background of some debates about professional conduct rules. Burden was a necessary ingredient in the union cases,<sup>220</sup> the challenge to minimum fee schedules,<sup>221</sup> and the lawyer advertising cases.<sup>222</sup> The losers in those cases argued that harmful consequences would follow if their opponents won. The Supreme Court thought little of those claims, nor did it so much as assign any burden of proof to the opponents. Why not? The easy and probably the complete answer is that governing law—the Constitution or the Sherman Act—already allocated the burden to the losers.<sup>223</sup> They failed to meet it, which is why they lost.

For the bans on fee-splitting with non-lawyers and non-lawyers as law firm partners, there is no equivalent background law to allocate burden of proof, unless it is the requirement that the state show a rational relationship between a rule and a goal the state has the legal power to achieve.<sup>224</sup> This is a low burden, to be sure. Yet these two bans impinge absolutely on what

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220. See *supra* Part V.A.

221. See *supra* Part V.B.

222. See *supra* Part V.C.

223. See *Goldfarb v. Va. ex rel. Va. State Bar*, 421 U.S. 773, 787 (1975) (stating that there is a heavy presumption against parties seeking to argue implicit exemptions to the Sherman Act created by the language of the statute itself).

224. See, e.g., *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (holding that the law prohibiting sale of caskets by anyone not licensed by state as funeral director bore no rational relationship to any legitimate purpose in violation of the Equal Protection and Due Process clauses).

many may consider to be rational economic behavior. With the right facts, courts may someday test the rules that categorically forbid fee-splitting with non-lawyers and non-lawyer ownership of law firms against this deferential level of judicial scrutiny. The decision may be adverse to the rules, at least insofar as the bans brook no exceptions, in which case, as with advertising, the union cases, minimum fee schedules, and lawyers for organizations, the bar will again be forced to accept changes imposed from outside. But the bar should not have to wait for outside pressure to confront these issues with analytic rigor. It should not need an external threat to teach it to be wary of unsubstantiated predictions of harm. “How do we know that?” is a question that should always be asked.

Let me zero in on the opposition to allowing a law firm in jurisdiction A to divide fees with a law firm in jurisdiction B, whose rules permit non-lawyer partners. Jurisdiction B may be in Washington, D.C., which has allowed non-lawyers to be partners in law firms since 1991,<sup>225</sup> so long as the firm only practices law and the non-lawyers actively participate in the representation of clients. The Model Rules permit a division of fees between firms when certain precautions are taken.<sup>226</sup> Should the fact that the firm in jurisdiction B has a non-lawyer partner prevent the firm in jurisdiction A from dividing fees with it? Although those who would forbid it, as apparently do the ISBA and the Senior Lawyers Division, do not spell out why the rules should prevent the fee division, the argument would have to go something like this: no matter what safeguards jurisdiction B has erected against the misconduct of, or bad influence by, a non-lawyer partner, that person can exert a corrupting influence on the lawyers in a different firm in jurisdiction A, using the lure of monetary reward to induce them to betray their clients or otherwise violate their oaths. And those lawyers may succumb despite the threat to their law license and career, thus undermining the policy of jurisdiction A to forbid non-lawyer partners. I hope this line of causation is recognized as so implausible that it should not be credited as sufficient to ban the division of fees even under the deferential rational relationship test. The implausibility of the argument may explain the decision not to state it explicitly. Nor should opponents of the status quo have any burden to show that the lawyers in state A will *not* be corrupted. This is a situation where statistically reliable proof (as opposed to anecdotal evidence) is likely unavailable, but where the line of causation is preposterous and should be rejected outright.

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225. GILLERS ET AL., *supra* note 26, at 346.

226. MODEL RULE OF PROF'L CONDUCT R. 1.5(e) (2009).

I do not claim that questions about burden will always be easy. I do say that burden of proof should be identified and defended when the wisdom of a rule is based on predictions about future harm. Furthermore, when a proposed rule interferes with the economic liberty of lawyers and clients, the proponents should presumptively have some, even if modest, obligation to justify the interference. Predictions with no evident intuitive appeal or empirical support should be unacceptable.

#### *D. The Composition of the Committees*

ABA committees that have studied rules governing lawyers and made recommendations to the House of Delegates have been composed nearly exclusively or entirely of lawyers.<sup>227</sup> Since the interests of persons other than lawyers are implicated in these rules, the near exclusivity in staffing is hard to justify. What explains it? The most plausible explanation is also the simplest: the lawyers who choose the members of the committees and commissions know other lawyers best. Choosing lawyers—and in particular those who, one knows from experience, are knowledgeable about the subject, have good judgment, are willing to do the work, and carry influence with the all-lawyer House of Delegates—increases the likelihood of a successful committee, one whose recommendations will be accepted.

Then, too, there is the fact that the job of these ABA committees is to generate rules that will operate in the legal system that lawyers are trained to understand. The natural inclination is to assume that one has to be “inside” that system in order to really know how it works and, therefore, to formulate rules that make sense in the greater scheme of things. This should not surprise us. It is a bias that can appeal to experts in all fields and with a basis in reality.

While I do not argue that non-lawyers should dominate the bar committees that propose ethics rules, I do suggest that other experts can bring to the table a range of experiences and habits of thought that will augment (and constructively challenge) those of lawyers. Further, since the rules serve constituencies other than the bar, having the perspective of persons who are not encumbered by formal legal training—who are not trained to think like lawyers, but like economists, philosophers, businesspersons, or social scientists, or who think like clients because they often are clients—can improve the product by opening the echo chamber that an all-lawyer committee can easily become. For the truth is that the issues are often not that hard and training in legal reasoning and knowledge about legal institutions not nearly as important as lawyers may prefer to

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227. I know from my own experience on the Multijurisdictional Practice and Ethics 20/20 Commissions that all members were lawyers (or judges). Nancy Moore, the Chief Reporter for the Ethics 2000 Commission, confirms that all but one of its members were lawyers (or judges).

assume. The absence of legal training can, in fact, be an advantage. Identifying potential non-lawyer committee members may present a challenge because lawyers tend to know each other best. But given the resources of national and state bar associations and the networking abilities of those who run them, the task is possible.

*E. Circulation of Proposals to Non-Lawyer Groups and Opinion Writers*

I know from my own service on ABA committees and from following the work of others that drafts of proposals are widely circulated within the ABA and to bar groups nationwide, aided by the internet. The scope of consulting and opportunity for comment is impressive. Reflection and revision is built into the process. This is partly why the Association's proposals receive a respectful, often deferential, reception in the courts. But although drafts of ABA proposals are publicly available on its website and reported in legal periodicals,<sup>228</sup> the public is not likely to become aware of them. Especially useful might be the opinions of professionals in other disciplines and opinion writers in the media. It may turn out that even when specifically invited to comment on drafts, few outside the law will show any interest in doing so, but that should not be the operating assumption. Rather, outside comment should be pursued, not just passively invited. Certainly, when a proposed rule would affect particular groups in society, it should be possible to identify organizations that promote the interests of those groups and reach out to them. Opinion writers and reporters for mainstream publications are obvious conduits for assessing the public's interest. It is for the public's benefit, not for lawyers, that the rules are written.

*F. Open the House of Delegates Listserv*

Members of the House of Delegates can email the entire House via a "closed" email system.<sup>229</sup> The House has 560 members,<sup>230</sup> so nothing is really secret. Any member can share an email—her own or emails of others—with anyone else. They are in no sense confidential. Despite the certainty of some sharing, the listserv remains formally closed. That means

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228. For example, the Commission on Ethics 20/20 posted all its drafts and comments addressing them. See [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).

229. The information here is based on conversations with House members and personal experience.

230. *House of Delegates – General Information*, AM. BAR ASS'N, <http://www.americanbar.org/groups/leadership/delegates.html> (last visited Oct. 24, 2012).



that non-members cannot routinely see what arguments House members are making in favor or against a proposal. Proceedings on the House floor are public. Emails that take positions on resolutions before the House should be public too. It should not be necessary for an outsider to have to ask a member for a copy of an email or all emails on a particular resolution. While House emails may have little value in interpreting the text of a resolution, they do shed light on the thinking of the body. Given the quasi-public nature of the ABA's work generating rules governing lawyers, transparency would be much enhanced if the public (not to mention scholars and historians) could know what members of its policy making body were thinking.

#### IX. A PERMANENT COMMITTEE ON THE FUTURE OF THE PROFESSION AND FOUR ISSUES ON WHICH IT CAN BEGIN WORK

Too often the bar has responded to events rather than anticipating and being ready for them. I realize it is in the nature of a bar association—and especially a national association with hundreds of thousands of members—to move slowly. That will always be true. Moreover, it should be true. Part of the ABA's credibility depends on its ruminating processes, sometimes cumbersome, for adopting policy. A futures committee is not meant to speed up the Association's responses as such, at least not appreciably, but rather to enable it to foresee issues when or even before they appear above the horizon and to gather the data that will assist the organization before it is imperative to respond. A futures committee might find the lawyers and social scientists willing to assist in the empirical research and compilation of data. Its members would not be expected to identify incipient trends solely from their own experience, which would be impossible. Rather, they would be expected to network extensively where lawyers gather and with constituent ABA groups. And the very existence of a futures committee, if broadly publicized, will generate leads through the suggestions of others. A futures committee could also stay abreast of innovations in a particular state or abroad, assess the outcome and value, and consider how that learning might be translated into national policy. It could propose provocative ideas (without endorsement) in order to start a conversation and test sentiment.

I offer four initial agenda items for the new committee.

First, and most daunting, is the effect of virtual presence on the traditional geo-centric basis for licensing lawyers. That basis requires a lawyer who has an office in a jurisdiction, other than temporarily, to be licensed by it or have some other authority to practice there. That premise remains fundamental to the regulation of the American bar.<sup>231</sup> What if a

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231. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(1) (2009).

lawyer has no “bricks and mortar” office in the jurisdiction but a significant virtual presence there and serves many of the jurisdiction’s residents? Is there a point at which virtual presence can be the equivalent of physical presence so that a license from the jurisdiction is required? This is not a purely theoretical question. Technology may be on a collision course with the geo-centric regulatory model. A sentence in a comment to the Model Rules currently envisions that there can come a point at which virtual presence, if great enough, will be the functional equivalent of physical presence and will require a local license to avoid unauthorized practice.<sup>232</sup> When the ABA’s 20/20 Commission proposed to expand the sentence to give lawyers more guidance,<sup>233</sup> it met resistance on the ground that doing so might impede the growth of virtual practice across borders, which the commentators saw as a good thing, or at least one that should be left free to evolve.<sup>234</sup> But if virtual presence in a jurisdiction, no matter how substantial, does not require a local license, we must ask why physical presence should require one, as long as the lawyer is licensed somewhere. For the lawyer who is virtually present in a jurisdiction may be able, at least on many matters, to do for a client pretty much anything a lawyer with a physical office can do.<sup>235</sup> That will become increasingly true as technology becomes even more sophisticated.<sup>236</sup> If we follow this to a logical conclusion, we

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232. MODEL RULES OF PROF’L CONDUCT R. 5.5(b)(1) (2009) (systematic and continuous presence of lawyer in a jurisdiction for the practice of law is forbidden if lawyer is not admitted there); *id.* cmt. 4 (“Presence may be systematic and continuous even if the lawyer is not present [in the jurisdiction].”).

233. The proposed additional language provided:

For example, a lawyer may direct electronic or other forms of communications to potential clients in this jurisdiction and consequently establish a substantial practice representing clients in this jurisdiction, but without a physical presence here. At some point, such a virtual presence in this jurisdiction may become systematic and continuous within the meaning of Rule 5.5(b)(1).

*Initial Resolution Model Rule 5.5(d)(3)/Continuous and Systematic Presence*, ABA COMM’N ON ETHICS 20-20, at 2–3 (Sept. 7, 2011), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20110907\\_final\\_ethics\\_2020\\_rule\\_5\\_5\\_d3\\_continuous\\_presence\\_initial\\_resolution\\_and\\_report\\_for\\_comment.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authcheckdam.pdf).

234. The New York State Bar Association’s Committee on Standards of Attorney Conduct, for example, told the Commission that “the proposal is likely to chill cross-border practice. . . . [T]he Commission should seek to decrease rather than increase the importance of local bar regulation.” *Comments on Ethics 20/20 Draft Reports Dated September 7, 2011*, N.Y. STATE BAR ASS’N COMM. ON STANDARDS OF ATTORNEY CONDUCT (Nov. 21, 2011), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/newyorkstatebarassociationcommitteestandardsofattorneyconduct\\_initialdraftproposalonrule1\\_6\\_5\\_5\\_d\\_3\\_1\\_7\\_andadmissionbymotion.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/newyorkstatebarassociationcommitteestandardsofattorneyconduct_initialdraftproposalonrule1_6_5_5_d_3_1_7_andadmissionbymotion.authcheckdam.pdf).

235. See Jordana Hausman, *Who’s Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Offices*, 25 GEO. J. LEGAL ETHICS 575, 588–589 (2012).

236. See *id.* at 576.

have to ask whether it will eventually make sense to ask all states to accept as sufficient the license a lawyer earns in another state. In any event, the exceptional challenges that a lawyer's virtual practice in a jurisdiction from a physical office elsewhere—or from no physical office at all— poses for the traditional licensing regime are ones the profession must address.<sup>237</sup>

The second agenda item for the new committee is to study licensing law workers to perform certain tasks for which a traditional legal education should not be required. This idea has been knocking around for decades, although with almost no traction.<sup>238</sup> Recently, the Washington Supreme Court approved a licensing regime for “legal technicians” who can work for clients without the supervision of a lawyer but whose scope of work is significantly circumscribed.<sup>239</sup> A legal technician cannot go to court or negotiate for a client or, without a lawyer's supervision, do legal research or prepare documents.<sup>240</sup> Essentially, a legal technician will assist clients who are representing themselves in court or otherwise. They are most likely to be used for family law matters, although the Washington Supreme Court's order is not so limited. The order is detailed and this is not the place to analyze each of its many strands, except to say that there are education and

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237. See Gillers, *supra* note 164, at 972–79. Confusion, or at least lack of consensus, on the relationship between physical presence and unauthorized practice can be seen when comparing the rules in Virginia with those in Colorado. The Colorado Supreme Court will allow lawyers from other states to practice any law in Colorado so long as they do not have a “domicile” or “a place for the regular practice of law” in the state. C.R.C.P. 220(1) (West 2012). Meanwhile, Virginia cares more about the law that is practiced than where it is practiced. Its rules seem to allow “foreign lawyers,” which includes lawyers admitted in another state or a foreign nation, to have an office in Virginia as long as they do not practice Virginia law from that office. VA. STATE BAR RULES OF PROF'L CONDUCT R. 5.5. And unlike Colorado, Virginia will deem some virtual law practice from outside Virginia to violate its unauthorized practice rules. Comment [4] to Rule 5.5 provides in part:

Other than as authorized by law or this Rule, a Foreign Lawyer violates paragraph (d)(2)(i) if the Foreign Lawyer establishes an office or other systematic and continuous presence in Virginia for the practice of law. Presence may be systematic and continuous even if the Foreign Lawyer is not physically present here. Such “non-physical” presence includes, but is not limited to, the regular interaction with residents of Virginia for delivery of legal services in Virginia through exchange of information over the Internet or other means. Such Foreign Lawyer must not hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia. See also, Rules 7.1(a) and 7.5(b). Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia if the Foreign Lawyer's practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar.

238. See generally, BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 135–41 (2000).

239. Supreme Court of Washington, *In the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, Order No. 25700-A-1005 (June 15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> [hereinafter *WA Order 1005*].

240. *Id.* at sections F, H(5)–(6).

experiential requirements for the license and an examination.<sup>241</sup> The plight of people of moderate means who need legal help is well known,<sup>242</sup> and, indeed, a particular concern of the ABA.<sup>243</sup> Lawyers may worry that the licensing of sub-professionals to do work that lawyers may also perform will hurt the bar economically. It may, although it may also be that the pro se clients served could not afford counsel, and so there is little business to lose. In any event, the economic concern, although surely understandable, especially in the current market, should carry no weight. As the Washington Supreme Court wrote, “[p]rotecting the monopoly status of attorneys in any practice area is not a legitimate objective” of regulation.<sup>244</sup>

If the legal needs of people of moderate means can be addressed and their interests protected through the creation of sub-professional categories—and I think the answer is that they can with appropriate safeguards—then the bar has a leadership role to play in defining the scope of and the conditions for a license like the one in Washington. Two of the three interests in the regulation of lawyers—those of the justice system and

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241. *Id.* at sections D, E.

242. As one scholar stated:

Money may not be at the root of all evils in our legal aid system, but it is surely responsible for many. The United States lags behind other developed countries in spending on civil legal assistance and has fewer intermediary institutions such as advice and ombudsperson agencies to assist with routine needs. When adjusted for inflation, “[f]ederal appropriations for the Legal Services Corporation, the largest source of money for aid groups,” has dropped by a third over the last fifteen years. Although other revenue sources have increased, they come nowhere close to meeting current needs. Funding varies considerably by jurisdiction but averages only about \$28 per poor person annually and in some states, drops to less than \$10. At these funding levels, not much due process is available. In the nation as a whole, even before the recent economic crisis, only one lawyer was available for 6,415 poor persons. Women and minorities are disproportionately affected.

The result is that virtually all legal aid providers are understaffed and overextended. Both national and state bar studies consistently find that over four-fifths of the individual legal needs of low-income individuals remain unmet. Moreover, these studies understate the extent of the problem. They do not include collective concerns involving matters such as community economic development, school financing, voting rights, or environmental hazards. Nor do they include middle-income Americans who are priced out of the justice system or individuals who receive only limited assistance that falls well short of adequate representation. Resource shortages have limited the effectiveness, as well as the extent, of services; legal aid providers in too many jurisdictions lack necessary training, coordination, staff support, and policy initiatives.

Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 878–80 (2009) (footnotes omitted).

243. See *Innovative Programs to Help People of Modest Means Obtain Legal Help*, AM. BAR ASS’N, <http://apps.americanbar.org/legalservices/delivery/delmodesthelp.html> (last visited Oct. 24, 2012).

244. *WA Order 1005*, *supra* note 239, at 7.

rule of law and those of the clients—demand as much. Doing nothing while decrying the inability of large groups of Americans to get legal help is indefensible. Arguing for more public money for lawyers to represent them, though laudable, has been singularly unsuccessful and is not likely to change.

My third agenda item for the proposed futures committee is to study and make recommendations for the regulation of companies that generate online legal documents for customers—so-called document preparation companies. These documents can be wills and trusts, the papers needed to incorporate a business, shareholder agreements, separation agreements, health care proxies, powers of attorney, documents for recording a trademark or copyright, real estate leases, prenuptial agreements, applications for tax-exempt status, promissory notes, bankruptcy petitions, and partnership agreements, just to name a few examples. The website for Legalzoom.com, perhaps the most prominent document preparer in the nation, lists some three dozen services a customer can purchase online.<sup>245</sup>

The sources for these quasi-legal services are only going to increase, or so we must assume, because they can be highly remunerative with relatively low entry barriers. Legalzoom.com is on the verge of an IPO.<sup>246</sup>

Courts and lawmakers should be as concerned with the quality of work done by document preparers as they are when they regulate the bar. The client (or customer) requires protection. On the other hand, it would be an overreaction and unworthy for the bar to attempt to stop the document preparation industry.<sup>247</sup> It would also likely be impossible since the industry can easily move offshore. Better to keep it here but regulate it. But what should the regulations say?

The futures committee I propose may be an odd source for an answer to that question because its members—entirely or mostly lawyers—will have an obvious competitive interest in making life for these companies as hard as possible, thereby impeding their ability to profit and survive. Here is where the bar can and must subordinate its own interests to protect those of the

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245. See *Our Products and Services*, LEGALZOOM.COM, <http://www.legalzoom.com/products-and-services.html> (last visited Oct. 24, 2012).

246. Debra Cassens Weiss, *LegalZoom Valued at 40 Times Last Year's Earning for IPO*, ABA J. (Jul. 25, 2012), [http://www.abajournal.com/news/article/legalzoom\\_valued\\_at\\_40\\_times\\_last\\_years\\_earnings\\_for\\_ipo/](http://www.abajournal.com/news/article/legalzoom_valued_at_40_times_last_years_earnings_for_ipo/). This article also notes competition from Rocket Lawyer and others. *Id.* The planned IPO has been delayed because of market conditions. See Olivia Oran, *LegalZoom IPO Delayed*, REUTERS (Aug. 3, 2012), <http://in.reuters.com/article/2012/08/02/legalzoom-idINL2E8J2EOB20120802>.

247. The state courts would have to agree and possibly state legislatures as well. When Texas lawyers tried to stop a computer program sold by Quicken Family Lawyer, arguing that it was engaged in unauthorized law practice, the state legislature amended the state unauthorized practice law to “overrule” a trial judge’s decision against Quicken. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999) (vacating lower court decision in light of revised statute). Furthermore, all state courts and legislatures might have to agree because the companies could move to those states that do not, making enforcement by other states difficult or impossible.

public. Unless lawyers will argue that document preparation companies always present too great a risk for the courts to tolerate no matter what the service—an argument that can be easily debunked for many low-discretionary tasks and especially in an age when people use online services to prepare sometimes complicated tax returns—someone has to identify the appropriate and fair level of regulation.

One place to start is with a requirement of disclosure on the companies' websites of the names, contact information, and jurisdictional admissions of all lawyers who prepared or supervised the preparation of the particular document that the customer is buying. If no lawyers participated in the creation of the document or its template, that should be clearly stated. Indeed, a regulation may require that a lawyer have reviewed any document generated to avoid unauthorized law practice.

A second regulation might impose on lawyers who participate in the sale of legal documents, and also on the document preparation companies, the same responsibility for competence as the law of legal malpractice imposes on lawyers doing the same work. The companies can be required to carry malpractice insurance, and they can be required to submit to the jurisdiction of the customer in the event of a civil claim.

Last, a decision must be made about the extent to which the companies have fiduciary duties to their customers, whether and to what extent they are bound by conflict of interest rules, whether they have duties of confidentiality, and whether communications with customers are privileged. To the extent that these protections are unavailable to a customer, the websites of the companies should prominently say so. The website should also clearly state that the company is not a law firm.

These are just some ideas for possible inclusion in a model statute or court rule that regulates document preparation companies. Surely, there are others. The point here is that someone must draft the regulations, and the draft must credibly balance the interests of the legal system in protecting the customers with the interest of customers in having access to this alternate (and often cheaper) source of legal services. The companies will not be stopped and should not be ignored by courts and lawmakers.

A final agenda item for the new committee is to review the governance procedures that the Association uses when it proposes amendments to the Model Rules or to court rules or legislation whose focus is the conduct of lawyers.<sup>248</sup> I have made some suggestions to improve the quality of the product. These build on what is already an impressive, deliberative, and

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248. See discussion *supra* Part VIII.

inclusive process. But there is room to improve. One possible change is to expand the time allowed for debate before the House of Delegates on the most consequential recommendations, which may come along once a year or less often. Today, presentations are limited to five or ten minutes.<sup>249</sup> It is worth considering whether a total of thirty minutes for argument and rebuttal should be afforded to each of two speakers on opposite sides of a question of great significance to the bar and the system of justice. Many members of the House of Delegates will not have had adequate time to read the reports and listserv comments that bear on a resolution. The debate will be their first or best chance to learn the details of the issues before them.

#### X. CONCLUSION: LEADERSHIP AND INFLUENCE

I believe the decades ahead will bring more change to the practice of law than can now be readily imagined and, I suggest, greater change than the profession has previously experienced in comparable periods. Lawyers and the organizations that represent them ought to be prepared. Actually, they ought to lead. But leading requires leaders.<sup>250</sup>

The women and men who have influence in the bar groups that judges and lawmakers respect and rely on should be in the vanguard of that leadership. And, of course, no bar group is more influential than the ABA. In my casual observation over the years, I have noticed that the identity of the population of influencers within the Association is fluid. Influence can be found among, but is not restricted to, those who happen at the moment to hold important positions, like chairs of sections, members of the board of governors, state bar presidents, or the president of the ABA itself (who serves for one year), although of course the influential group will often include many of those officeholders. A sociologist or political scientist might someday write a fascinating book tracing the distribution and sweep of influence within the Association, including who has it, how it is acquired, and how it is deployed. Longevity within the organization is surely a contributing factor. So is the prominence and respect a person may have earned through achievement elsewhere. Trading favors as a basis for influence cannot be discounted, but my working hypothesis is the influence is mostly meritocratic. People who are willing to invest energy and time, know how to listen, have good political instincts and open minds, and are thoughtful and experienced on the issue under discussion will likely get heard. I surmise that at its core the population of this “control group” numbers fewer than 500 lawyers and judges (which will shift depending on

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249. ABA CONST. & BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES § 44.2(b) (2011).

250. A worthwhile introduction may be found in Deborah Rhode’s work on leadership. *See* Deborah Rhode, *Lawyers and Leadership*, 20 PROF. LAW. 1 (2010). Citations to other works, including by Professor Rhode, appear throughout and especially at 13–14 nn. 39, 51.

the issue), with another 500 disbursed along the borders.

No doubt inspired in part by my academic experience (or bias, if you prefer), I am advocating that the bar use standards for law school scholarship as a model. Why can't *they*—the bar groups—behave more like *us*—the law teachers—at least on the big questions? I say “more like,” not “exactly like.” I am thinking of the methodology and intellectual rigor expected of legal scholarship (although not always fulfilled) and not the particular and often obscure subjects of academic writing. What I see in the best of legal scholarship is precision, clarity, candor, thoroughness, and revision. In the academy, nothing need be settled. Articles are written but their ideas can then be reconsidered in new articles, *ad* (practically) *infinitum*. Questions remain open. Answers are never final. The rulemaking world does not enjoy that luxury, of course. But it might discover other lessons in the academic toolkit. One is to anticipate the future, for which I've proposed a futures committee, and a second is greater room for deliberation of the big questions, for which I've proposed lengthier debate between two speakers on major questions, lasting at least as long as a Supreme Court argument.

A third academic value is to treat the ideas of others seriously and with respect. That means rejecting the types of argument described in Part VI. An academic lawyer would, I hope, be mortified to make the arguments that were leveled against collaborative law. Or to base an argument on predictions lacking both empirical support and strong intuitive appeal. Or to suggest that a position should be rejected because of the “evils” it portends, with no deeper analysis or explanation. Look again at these two summary sentences from the report that accompanied the resolution from the ISBA and the Senior Lawyers Division:

The evils of fee sharing with nonlawyers in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.<sup>251</sup>

Really? The prohibition against nonlawyer fee sharing is “as important” to the country or the profession as due process and the rule of law? Other nations, including common law nations, including the one from which the United States derived its legal traditions, today allow fees to be shared with

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251. See ISBA Report, *supra* note 180.



nonlawyers in certain circumstances.<sup>252</sup> Is what England (or indeed Washington, D.C.) permits as grave as forsaking the rule of law? Even allowing for hyperbole, this statement is an embarrassment. Nor was it uttered in a heated moment. It was in a report from two esteemed groups and which was presumably reviewed and revised by several lawyers before its release.<sup>253</sup>

Any discussion of leadership on the rules must recognize the judiciary. In focusing as I do on bar associations, I do not mean to exempt courts from the responsibility to make these issues their own. Bar groups work for the judges, in a sense, and the judges, who have the actual power to decide the rules, work for all of us. Judges should not view their job as simply to review and approve, disapprove, or modify proposals from bar associations. They should do all that, of course, but reliance on the bar cannot be allowed to eclipse affirmative action when appropriate. It would take another article fully to examine the professional responsibility of the judiciary in making rules for lawyers, but a starting point, by way of positive example, might be the New Jersey Supreme Court. That court's rules provide for court appointment of an Advisory Committee on Professional Ethics consisting of fifteen members, three of whom are not lawyers.<sup>254</sup> The committee responds to ethics questions from the bar.<sup>255</sup> Its opinions may be reviewed by the court on petition from "any aggrieved member of the bar, bar association or ethics committee."<sup>256</sup> And the court itself may pose questions to the committee.<sup>257</sup> The court also has a second committee, whose responsibility

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252. Solicitors' Code of Conduct R. 8.02(b) (2007) (allowing for fee-sharing with non-lawyers).

253. The ISBA President spoke in support of the resolution on the floor of the House of Delegates. He characterized the two ALPS proposals—fee-sharing between two firms, one of which has non-lawyer owners as allowed by the rules of the controlling jurisdiction; and fee sharing between two offices of the same law firm where one office has non-lawyer owners in a jurisdiction that permits it—as “a movement toward Multi-Disciplinary Practice [MDP] ‘by another name.’” *Remarks of John E. Thies to ABA House of Delegates in Support of 10A*, ILL. STATE BAR ASS'N (Aug. 6, 2012), available at <http://iln.isba.org/sites/default/files/blog/2012/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates/jet%20remarks%20to%20hod.pdf>. He referenced a New York Times story headlined “Selling Pieces of Law Firms,” and added: “Whether this article happened on its own, or as a part of some marketing campaign, this is not a message we want the public to hear.” *Id.* The intimation of a concerted, behind-the-scenes orchestration (a “campaign”) is hard to miss. *Id.* But in case the implied connection was not clear enough, the speaker added that the Times “article was followed soon after” by the ALPS proposals. *Id.*

Perhaps linking the ALPS proposals to MDP was viewed as effective advocacy. MDP is a “fighting” acronym for the American bar, churning up memories of recent and heated debates. If the ALPS proposals could be seen as a precursor to MDP “by another name,” the chances for approval of the ISBA resolution would be enhanced. *Id.* But MDP and ALPS are not the same, logically or doctrinally. MDP describes a single entity that sells both legal and other services through owners who are both lawyers and non-lawyers. See discussion *supra* Part VI.B.

254. N.J. Ct. R. 1:19-1.

255. *Id.* R 1:19-2.

256. *Id.* R 1:19-8.

257. *Id.* R 1:19-5.

includes recommendations for changes in the professional conduct rules for lawyers.<sup>258</sup> In this way, the court insulates itself from overdependence on the state's bar association.

Rethinking how the ABA understands its leadership role in addressing the challenges that lie ahead will not be easy given the diverse interest groups contained within it and the multiple perspectives of its members, a product of the greatly different (and expanding) worlds in which lawyers practice and the generational differences among them. But if the ABA doesn't lead, who will?<sup>259</sup> If not now, when?

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258. See *2010–2012 Report of the Professional Responsibility Rules Committee*, SUPREME COURT OF NEW JERSEY PROF'L RESPONSIBILITY RULES COMM. (Jan. 9, 2012), available at, <http://www.judiciary.state.nj.us/reports2012/PRRC2010-12RPT.pdf>. Most recently, the court asked the committee to review the New Jersey rule requiring lawyers to have a physical law office. The court reference responded to a state bar letter advocating virtual law offices. *Id.* at Appendix A-3, p. 1. The committee recommended changing the court rules to permit virtual law offices. Mary Gallagher, *Supreme Court Panel Recommends Allowing "Virtual" Bona Fide Offices*, N.J.L.J., Feb. 13, 2012, at A1. As of September 10, 2012, the court has not ruled.

259. My emphasis on the ABA is not intended to remove state and local bar groups from the enterprise. They may be more nimble in identifying matters that need attention and long range planning. Certainly, in their dual roles as freestanding organizations and constituents within the ABA, they are positioned to inspire or prod the ABA to explore issues it might otherwise overlook.

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